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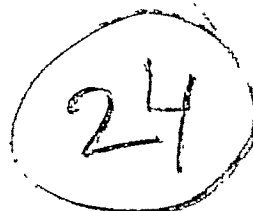


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LAW JOURNAL

University College of Law Union, Calcutta



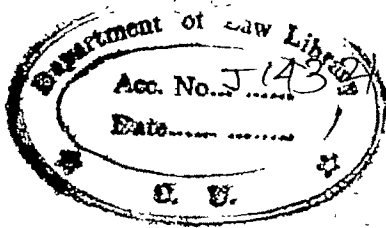
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Prof. Jogendra Nath Haldar

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Dilip Kumar Sen

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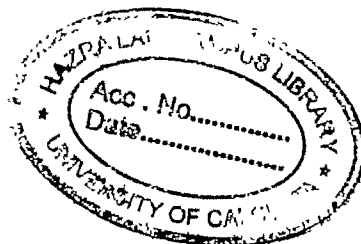


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1970

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Prof. Jogendra Nath Haldar



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सत्यमेव जयते

Rashtrapati Bhavan,
New Delhi-4
June 1, 1970.

Dear Shri Sen,

The president thanks you for your letter of the 29th May, 1970, and sends his best wishes for the success of the annual magazine which will be brought out by the University College of Law Union, Calcutta.

Yours sincerely,
(A. M. Abdul Hamid)

Shri Dilip Kumar Sen,
Joint Secretary,
Magazine,
Univesity College of Law Union,
Calcutta.



सत्यमेव जयते

Secretary To the Vice-President of India
New Delhi

23rd June, 1970

Dear Sir,

The Vice-president sends his best wishes for the success of the Annual Number of your Magazine which you are going to bring out.

Yours faithfully,
(V. Phadke)

Shri Dilip Kumar Sen,
Jt. Secretary Magazine,
University College of Law Union,
Calcutta-12

Supreme Court of India

New Delhi

May 6, 1970

Dear Mr. Sen,

Many thanks for your letter inviting me to contribute an article to your forthcoming Law Journal. I am afraid I am unable to contribute any article as none is ready and I am not having enough leisure to write one specially for your Journal. I wish the Journal all success and I hope that the students will take full advantage of the publication of the Journal.

Yours sincerely,
(M. Hidayatullah)



सत्यमेव जयते

Raj Bhavan,
Calcutta.

6th June, 1970.

Dear Sir,

I am desired to say that the Governor of West Bengal is glad to learn that the University College of Law proposes to bring out its annual magazine shortly.

The Governor sends his good wishes on the occasion.

Yours faithfully,

(R. C. Ganguly),

Assistant Secretary
to the Governor, West Bengal.

Shri Dilip Kr Sen,
Jt. Secretary,
Magazine,
University College of Law Union,
Calcutta-12,

LAW JOURNAL

University College of Law, Calcutta 1970

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V. I. LENIN

The man to whom the present era belongs.

Editorial

The people of West Bengal have once again been deprived of their democratic rights to be governed by their elected representatives and the end of the President's rule is not in sight. All powers of the West Bengal Legislative Assembly have been handed over to the Parliament by the President's proclamation under Article 356 of the Constitution although it was not probably necessary as the Legislative Assembly has not been dissolved by the proclamation. All the executive functions of the state and all the powers of the Governor have also been assumed by the President although only some of these functions and powers could have been assumed by the President and the rest could have very well been left over to the state Government and the Governor. The resignation of a Chief Minister and the arbitrary refusal of the Governor to allow Mr. Jyoti Basu to form a Ministry and face the Legislative Assembly did not call for assumption of all the functions of the state Government and all the powers of the Governor by the President or for transfer of all the powers of the state Legislative Assembly to the Parliament but the same have been deliberately done for the political expediency of the group of the Congress Party ruling at the centre. While Article 356 gives emergency powers to the President, it does not necessarily mean that the President must assume all the functions and powers or must hand over the powers of the Legislative Assembly to the Parliament, particularly, in view of the power of the President to suspend the whole or any part of the Constitution acting under Article 356. In the absence of a Council of Ministers in West Bengal, State Legislative Assembly could very well have its sittings and transact its business and for that purpose, those provisions of the Constitution which would stand in the way could have been suspended by the President and the Rules of Procedure for transaction of Legislative business in the Assembly could have been suitably amended by the Assembly itself and thus the Assembly could have been allowed to function without taking away the democratic rights of the People of this State. If only some of the functions of the State Government which are required to be discharged by the Council of Ministers were assumed by the President, that would meet the situation without much encroaching upon the powers of the Governor or the State Government or the Legislative Assembly and they would not have been reduced to non-entities. But why then has the President assumed all functions of the State Government and all the powers of the Governor and also handed over all the powers of the Assembly to the Parliament? The reasons are only political and not Constitutional and the conclusion is inescapable that the

political expediency of the Party in power at New Delhi compelled the President to take such a step and all talks about democracy and democratic principles or desire to uphold the Constitution in the working the Government are nothing political hypocrisy. Again, the power given to the President under Article 356 is not an executive power of the Union so that he may be required to act according to the advice of the Prime Minister or the Central Cabinet. It is a special power and a special provision of the Constitution which excludes the general provisions regarding the vesting and exercise of the executive powers of the Union and can only be exercised by the President himself in his sole discretion and judgment and not in any other manner and the Prime Minister or the Central Cabinet have no Constitutional role to play in the matter. It is not officially known whether the President in this case acted on his own or acted on the advice of the Prime Minister of the Central Cabinet but reports appearing in various Newspapers and statements issued by the Central Ministers unmistakably point out that the decision was taken by the Central Cabinet and the President merely put his signature upon the Notification of the proclamation already decided upon by the Central Cabinet and he had really nothing to do in the matter of taking decision. On the assumption that the President himself alone did not decide upon the necessity of issuing the proclamation and in the present form without the aid and advice of the Central Cabinet, the act of the President is both in contravention of the Constitution as well as the norms of decent political standard. President ought not to have abdicated his powers in favour of the Central Cabinet or Prime Minister Mrs. Indira Gandhi even if the President is personally under any moral obligation to her and he should have acted in accordance with the letter and spirit of the Constitution. President's dismal failure in this regard and particularly when he himself is a lawyer, is lamentable indeed and India stands poorer to day because of this ill-advised act of the President. Lovers of democracy and the Constitution of India should counsel the President to undo the mischief created by his act and save both democracy and the Constitution before it is too late.

* * * * *

West Bengal after the proclamation of the President on 19th March, 1970 is without a Governor but not the Council of Ministers. Chief Minister Mr. Ajoy Mukherjee has gone and with his exit has killed his Council of Ministers but Mr. S. S. Dhavan has lost no time to have his Council of Ministers headed by the old and veteran Mr. B. B. Ghosh for this unfortunate state. Whether you call Mr. Ghosh as Chief Minister or Mr. M. M. Basu as the Home Minister or call them the Principal Adviser and Adviser-in-charge of Home Department respectively, it matters little from the practical point of view. The Advisers of Mr. Dhavan have got all the powers of the Ministers and their Ministerial responsibilities and powers and amenities have been legalised by Mr. Dhavan

by amending the Rules of Business of the Government of West Bengal pretended under Article 166(3) of the Constitution and in the unamended Rules of Business wherever you find the word "Chief Minister" or "Minister-in-Charge of the department" please read it as Principal Adviser, and Adviser-in-Charge respectively and that is the law made by Mr. Dhavan on the dictates of his masters at New Delhi. An old Gandhian socialist Mr. Dhavan ought to have considered that the monthly salary of rupees four thousand with all other amenities sanctioned by him for his princely Advisers looks odious and much too generous when people of this poor state are starving and dying and when lakhs of youths are unemployed in this unfortunate state, an unwanted child of mother India represented by the neo-socialist Mrs. Indira Gandhi. Mr. Dhavan is just the Governor of West Bengal for the purpose of "nomenclature" only as his Joint Home Secretary Mr. Krishna Govinda Basu calls him but to the laymen, he is the Governor of West Bengal just to receive the princely salaries and luxuries allotted to the Governor by the Constitution and to a student of Constitutional law he is merely an agent of the President of India to carry out the orders emanating in the name of the President from New Delhi Secretariat decided upon by Mrs. Indira Gandhi and her happy and prosperous Cabinet upon the advice and threats of her party bosses of West Bengal and to a student of politics, he is an emissary of Mrs. Indira Gandhi to perform the delicate and diplomatic task of bringing Mr. Ajoy Mukherjee and his associates and campfollowers nearer to Mrs. Indira Gandhi. Mr. Dhavan's powers as a Governor are gone and with that his personal prestige too. The President's Proclamation has reduced his position to a ridiculous absurdity and his serious efforts to please his present masters on the political arena of West Bengal have so far gone in vain. His removal is being daily demanded by his new masters for his alleged failures to run the administration of the state as his masters want, he has to keep standing for nearly half an hour when his new masters seriously discuss the problems of the state with Prime Minister Mrs. Gandhi on her conducted tour of the draught affected areas of Purulia and Bankura and his car in the chivalrous motorcade journey of the Prime Minister finds ninth or tenth place in the row and the legal fraternity to which he belonged once is boisterous over his speech at the Swearing-in-Ceremony of the Chief Justice of the Calcutta High Court. Mr. Dhavan is not, however, slow to see the sultry weather around him and is desperately trying to restore his image in the eyes of his new masters. He has asked the state lawyers not to pursue the case in the Calcutta High Court challenging the power of the Central Government to encroach upon the powers of the ordinary criminal courts of the state in the matter of trials of army personnel accused of criminal offences, transferred a large number of officers who were in the departments of the Communist (Marxist) Ministers, instituted Commissions of Inquiry whenever his new masters demanded, put floral wreaths wherever his new masters desired, put at least two Communist (Marxist) members of the Legislative Assembly behind the

prison bars and is trying still to have a popular (?) Government with Mr. Ajoy Mukherjee and lastly has come out in the open slandering the rule of the United Front Government on the question of law and order with the horrid picture of the nights in Calcutta born out of phantasy. Fools are they who call Mr. Dhavan tactless.

* * * * *

On April 8, 1969 five workers of Cossipore Gun and Shell Factory died as a result of firing resorted to by three sepoy of the Defence Security corps inside the factory for which four civilian officers were arrested by the state police and warrants for arrests were issued by the Police Magistrate against the three sepoy for production before the Criminal Court to stand trial. The sepoy could not be arrested by the state police as they were kept inside the Fort William by the army authorities and the army authorities moved the Calcutta High Court in its Criminal Revisional Jurisdiction to quash the orders of the Police Magistrate inter alia on the ground that the said army personnel were on active service and as such as the ordinary criminal court has no jurisdiction to try them because of the provisions of the Army Act and the Criminal Court and Court Martial Adjustment of Jurisdiction Rules and the notification of the Government of India under the Army Act declaring all persons governed by the Army Act to be deemed to be on active service wherever they are. Over these brutal murders of workers, entire West Bengal went into mourning and a complete hartal was observed through out the state and the United Front Government of West Bengal opposed the application of the Army Authorities before the High Court and also filed a writ petition challenging the Constitutional validity of the Notification of the Government of India regarding "active service" of the persons governed by the Army Act. It was a very serious matter from the Constitutional and legal points of view and only on an authoritative pronouncement on the Constitutional validity of the said Notification of the Government of India under the Army Act depended whether the contentions of the Army Authorities were right or wrong. What is the crime that those five workers committed so that their murderers would be tried according to a law whose constitutional validity is open to objection and in fact was objected to by the United Front Government in the above proceedings before the High Court? What is the sin that the people of West Bengal have committed that a case which involves substantial questions of law as to the interpretation of the constitution and which has not so far been raised or decided by any Court of Law, should not be continued merely because the United Front Government fell down? On a plain reading of the impugned Notification it appears that the deeming provision of "active service" is ultravires on the ground of excessive delegation of legislative functions and/or complete abdication of essential legislative functions to the Central Government without any guiding principle or guide-lines or legislative policy being indicated in the Army Act under

which the impugned notification was issued by the Government of India. Apart from the serious constitutional question involved, the case also involved other serious matters as to the practical difficulties and impossibilities faced by the state police in the matter of investigation into the case against the civilian co-accused officers and the hostile attitude of the Army Authorities in refusing to hand over the weapons of offences, and other materials connected with the offences and refusing to allow investigation at the spot of the incidents which happened to be inside the factory under the control of the army authorities the jurisdiction of the ordinary Criminal Courts and the exclusive right of the state Government to launch prosecutions in such cases which have been illegally encroached upon by the Central Government ought to have been asserted and not given away by Mr. S. S. Dhavan even if the lives of five workers meant nothing to him. The learned Judges of the High Court were told that the state did not press for the writ application and would not oppose the Criminal Revisional application of the army authorities and as such they could not and did not take notice of the Constitutional infirmities of the impugned Notification of the Central Government and merely dealt with the other provisions of the Army Act to uphold the objections of the army authorities against the trial by the ordinary Criminal Court. Change of a Government does not certainly cure the Constitutional infirmities of a law or a Notification but still Mr. Dhavan thought it wise not to contest the case. Has Mr. Dhavan any right to insult and injure the wounded feelings of the people of West Bengal or is it a decent political behaviour to undo everything that the United Front Government did even when the matter deserved authoritative pronouncement by the highest judiciary in the State for the sake of Rule of Law, if not for anything else? Mr. Dhavan, the agent of the President of India and the Governor of the State without Constitutional powers is no doubt bound to do what he is asked by his masters at New Delhi if he has in this matter acted at the dictates from New Delhi or from his masters who are also the accredited agents of the Prime Minister in this State but he certainly owes an explanation to the people of West Bengal for his contempt for the poor workers killed, aversion for the powers and rights of the State Government, desire to discredit the United Front Government and above all his contempt for the judiciary as his act was calculated to obstruct or interfere with the course of justice in a very subtle and indirect manner. Surely, it does not benefit an ex-Judge of an Indian High Court.

* * * * *

Mr. S. S. Dhavan is the Chancellor of a number of Universities of West Bengal and in his régime or to be precise in the regime of Mrs. Indira Gandhi through Governor Dhavan, Universities and Colleges in this State are now in occupation of the Central Reserve Police allegedly to maintain law and order and to protect the lives and properties and the portraits of the national leaders. Mr. Dhavan's Minister alias adviser in charge of the Education Department

Mr. K. Sen is certainly to be congratulated for his achievements within such a short period of his rule. Why should the educational institutions be polluted by the entry of the Central Reserve Police, or any other police force? If the temples of learning have become the haunting grounds for extremist activities, the responsibility lies solely and squarely upon them who ruled this State since 1947 till the other day and those who have enriched themselves and got their favourite persons and class enriched beyond imagination not excluding the retired I.C.S., I.A.S., High Court or Supreme Court Judges or the ex-Indian Envoys, at the expense of the poor citizens and at the cost of millions of unemployed youths of West Bengal who have no future before them. We would respectfully request Mr. Chancellor and his Ministers alias Advisers not to gloat over the theory "If you cannot tame the child, kill him". If the youths of Bengal do not want the present educational system or even do not want the present political system to continue, certainly bullets are not the answer. How many bureaucrats or industrialists or even politicians have given over their fortunes to the society so far in this country so that they may morally speak for the present order can be counted in fingers and those who decry the student violence or indiscipline do not fall in the category of those very few.

* * * * *

Calcutta University is in a mess today and so also is the University College of Law. Learning is no longer the aim of the students in general and teaching is no longer the prime concern of the authorities. Has anyone heard that a Law College with nearly six thousand students is only allowed to spend a paltry sum of few thousands of rupees annually for its library or is there a College without a regular Principal for more than four years? The law teachers are allowed the pittance of rupees two hundred fifty to three hundred a month and they cannot be expected to devote their time and energy for the institution or for proper teaching of the students. Standard of law education has lamentably deteriorated and the examinations have become night mares for the examiners and playthings for the examinees and the persons incharge of the University are in their deep slumber. Sir Asutosh certainly did not dream of such a University or a Law College and the persons who were zealous to abolish the separate identity of the University Law College apart from being a mere department of this ill-fated University are entirely to blame for this sorry state of affairs and guilty of subversion.

* * * * *

Mr. S. S. Dhavan by his controversial but remarkable speech of the occasion of the swearing-ceremony of the Chief Justice of the Calcutta High Court has thrown a hornets' nest around him but this time Mr. Dhavan is not on the wrong track. In that controversial speech, he has paid glorious tribute to the bench and the bar and he has rightly sounded a note a caution against the standard of

legal education which has affected the bench as well as the bar and the monopolistic attitude of the senior Members of the bar in general. Naturally, the vested interests must be up against Mr. Dhavan for his forthright criticism but Mr. Dhavan has also given them the handle to exploit the situation against him. Every judgment of every Court of law is open to criticism and certainly the "jury's verdict" of the Supreme Court in the case of L. C. Golaknath-vs-State of Punjab is open to serious criticisms from legal as well as political points of view. But why should a Governor criticize a Supreme Court Judgment and such criticism cannot be lost sight of by the erudite lawyers! We have vainly searched the Constitution of India to find out any provision prohibiting a Governor of a State to criticize a Judgment of a Court of Law which is always a public property. "Justice is not a cloistered virtue", we have been told by a noble Law Lord and that is accepted as universal truth by everybody and the right of criticism of a judgment available to a member of the public cannot be denied to a person who also happens to be a Governor of a State. Moreover, Mr. Dhavan no longer possesses any of the powers of the Governor of this State. He is a person-a-designata only and a mere agent or subordinate officer of the President of India. On that ground also, Mr. Dhavan has the same right equally available to a lay public. The reasons for the furore are, however, deep rooted and the demand for recall of Mr. Dhavan by particular political parties lies at the root of the objections against his speech.

* * * * *

We congratulate Mr. Justice Prasanta Bihari Mukharji on his appointment as the Chief Justice of the Calcutta High Court after a series of supersessions. A Judge of high scholarship and learning and a jurist of considerable fame, Mr. Justice Mukharji well deserves the post and it is really unfortunate that he was wronged for so many years on mere suspicions or possibly for enmity and jealousy. The gossips that were circulated against him and the wirepullings of interested persons almost sealed the fate of Justice Mukharji and we are happy to note that ice has broken this time. We are, however, sorry to note the trend that is taking place in our country in making appointments to the posts of Supreme Court Judges. Without meaning any disrespect to anyone, we may say that the failure of the selectors to rest their choice on Mr. Justice Paresb Nath Mookerjee and Mr. Justice Durgadas Basu cannot go unnoticed. Mr. Justice Basu is a jurist of international repute and his judgments have been acclaimed over the whole country and a litigant does not feel sorry if he loses the case in his Court. His contribution to Constitutional law is not only remarkable but also unique. Mr. Justice Mookerjee is universally regarded as a scholar Judge who dispenses justice with evenhandedness and his performance in the bench has been a source of pride to the legal profession. It is curious indeed that both Mr. Justice Basu and Mr. Justice Mookerjee have so far failed to attract the

attention of the persons in whose hands the future of the judiciary, the Rule of Law and the democratic Government of this country depend. Possibly learning is no virtue in the judicial hierarchy of this country and extra-judicial activities pay greater dividends.

* * * * *

We send our heartiest congratulations to Dr. B. N. Mukerjee, Officiating Principal of the Calcutta University Law College on his new assignment as a Visiting Professor to the U.S.A. for 2 semesters. It is learnt that Dr. Mukerji has applied for leave for this period and doubts are being expressed in some quarters that Dr. Mukerji may not come back to the College after the expiry of his leave. Presumably the unkind treatments so far meted out to Dr. Mukerji by the University authorities have given rise to such doubts and misgivings. Dr. Mukerji is the confirmed Vice-Principal of the College and as such he is a Reader of the University. The post of Principal of the College is the post of a University Professor and as the officiating Principal, he is entitled to draw the salaries and allowances of a University professor but for four years and a half he was not allowed the officiating pay and allowances of a University professor. The scales of pay of University Readers have been revised but he was not given the revised scale of pay and allowances allowed to other Readers of the University and the matter has been shelved to a Committee to decide whether he would be allowed the revised scales of pay of a University Reader. By virtue of being a Reader as well as an officiating University professor, Dr. Mukerji is entitled to become ex-officio member and elector in different bodies of the University but those rights were not recognised for long. Above all, even within these four years and a half the authorities could not decide whether they would appoint him permanently as the Principal of the College although two advertisements for the post were issued earlier and a third one has just been issued. Dr. Mukerji was made to work as the Principal without any Vice-Principal for these years and the College having now a branch also. In spite of constant student troubles in other Colleges and the departments of the University, University College of Law was being run without any serious trouble or dislocation and credit for smooth running of the institution for these years should legitimately go to Dr. Mukerji. The University authorities may have their different assessments or evaluations of Dr. Mukerji's worth and work but the students have their own which only show nothing but love, affection and goodwill for a most competent and eminent Principal. It is earnestly hoped that the authorities will still realise the gravity of the situation and not precipitate the matter.

Jurisdictional Immunity Of Foreign States Under The Indian Law.

By

Mr. Justice Sabyasachi Mukharji, Judge,
Calcutta High Court.

1. Are Foreign States immune from being sued in Indian Courts? The question is of legal interest and economic importance. There are two different trends in the laws prevailing in countries apart from India on this subject. How far a Foreign State is immune from being sued in an English Court in respect of commercial transactions has yet to be finally and directly decided by the House of Lords in England. By the decisions of the Courts of Appeal in England Foreign States enjoy jurisdictional immunity even in respect of matters of commerce. It is necessary to examine the historical background for the prevalence of this view in England and how far that background applies to India. The reasons behind such theory of immunity of Foreign State in Municipal courts also require consideration. The laws in the continent of Europe indicate a different trend limiting or gradually abandoning the immunity of Foreign States in matters of commerce.

2. As a result of several decisions mainly of **In Parlement Belge** reported in (1880) 5 P.D. page 197, **The Cristina (1938) A.C. 485**, **Dollfus Mieg et cie Vs. Bank of England** reported in (1952) A.C. 582, **Kahan Vs. Federation of Pakistan 1951**, 2 Kings Bench 1003, it seems that the British view is as stated in Dicey's Conflict of Laws, Seventh Edition, page 9, Rule 17 that the Courts in England have no jurisdiction

to entertain an action or other proceedings against any Foreign State or the head or government or any department of the government of any Foreign State or any Ambassador or other Chief Diplomatic or like agent representing a Foreign State or any person belonging to official or domestic suite of any such Ambassador or diplomatic or like agent, or any international organisation specially protected by or under the statute. Though the case was not regarding the commercial transactions of a Foreign State, in a very illuminating judgment Lord Denning in the case of **Rohimtulla Vs. Nizam of Hyderabad**, reported in (1958) Appeal Case at page 418 states thus :—

“This rule was formed in the days when no action lay against the sovereign in any circumstances. It was thought to offend the dignity of a sovereign and to impinge on his independence if his subjects were allowed to sue in his own courts. Likewise, if he was sued in the courts of another country. Proper respect for sovereign power, therefore, required that a sovereign should not be impleaded, directly or indirectly, in the courts of his own or any other country without his consent..... In all civilised countries there has been a progressive tendency towards making the sovereign liable to be sued in his own

courts; notably in England by the Crown Proceedings Act, 1947. Foreign Sovereign should not be in any different position. There is no reason why we should grant to the departments or agencies of Foreign Governments an immunity which we do not grant our own provided always that the matter in dispute arises within the jurisdiction of our court and is properly cognizable by them."

It is submitted that this approach and/or the historical justification of the rule is the correct one. Dicey in the *Conflict of Laws* in the Seventh Edition at page 131 states that the immunity of persons of sovereign as well as of ambassadors and diplomatic representatives of such States are but derivatives of the immunities enjoyed by the States themselves. It is submitted that this is historically not a correct statement. The immunities granted to the Foreign States by certain countries notably in England is an emanation of the immunities granted to the persons of the foreign sovereigns rather than that the immunities of the foreign sovereigns are derivatives of the immunities granted to the foreign states. In the case of *Compania Naviera Vascongado and Steam Ship "Cristina"* reported in (1938) Appeal Cases, page 485, Lord Macmillan observed at page 498—"I confess that I should hesitate to lay down that it is a part of the law of England that an ordinary trading vessel is immune from several process within this realm by reasons merely by the fact that it is owned by a Foreign State for such a principle must be an importation of international law and there is no proved consensus of international opinion or practice to this effect."

3. From the above analysis of the cases and practice it seems that in England Foreign States do enjoy immunities in all matters including the matters of commerce. Doubts have been expressed as to the propriety and efficacy of this rule in England by Lord Denning as mentioned before and also by Lord Maugham. The Court of Appeal in England seems to be bound by its

previous decisions. It is also to be noted that in England the King could not be sued and/or no action lay against the government until the statutory introduction of the liability by the Crown Proceedings Act of 1947. The position is otherwise in other countries as would be noted hereinafter.

4. In America where the Courts have so long granted immunity to Foreign States there is a distinct tendency manifest in view of the Executive Department of the State's opinion that immunity should not be granted in matters of 'jure gestionis.' In a letter dated the 5th of May 1952 Prof. Jack Barnard Take, Acting Legal Adviser to the Department of the State wrote to the Attorney General that the department has reached certain conclusions that the immunity should not be granted to certain types of transactions of the Foreign States.

5. In accordance with the view mentioned hereinbefore treaties between U.S.A. and other various countries have been made which provide expressly that State owned or state controlled agencies of Foreign Countries should not be granted immunity in the territory of other country. In 1955 in the case of the *Republic of China Vs. National City Bank of New York* the Supreme Court by majority rejected this plea of the plaintiff government which was trying to recover a bank account of the National City Bank. This case is considered by many to be the turning point in the American trend. It is, however, important to remember that this case is complicated by the question of submissions to jurisdiction which is entirely different from that of enjoying absolute immunity and perhaps this decision may have depended on the principles of the submission to the jurisdiction rather than the enjoyment of absolute immunity.

6. The present view in France, Holland and other parts of the continent seems to be that in matters of commerce or in matters which are called *jure gestionis* as distinguished from *jure imperii* foreign states do not enjoy immunity.

7. The matter had come up for considera-

tion before the Committee of Experts under the League of Nations and the International Law Commission has adopted a memorandum on this point and it was also considered by the Asian Legal Consultative Committee in New Delhi in April 1957. Though the trend of the preponderant view seems to be that there should be codification limiting the immunities enjoyed by Foreign State on certain well recognised principles, nothing tangible seems to have resulted as yet. In certain spheres, however, some States have taken positive steps such as Brussels Convention 1926, The Geneva convention on the Law of Sea 1958, the General Agreement on tariffs and trade 1947 etc. and the specific treaties entered into by certain States, notably U.S.A. and U.S.S.R. (For a detailed discussion see **'State Immunities and Trading Activities'**—by Sompong Sucharitkul, p. 336).

8. It is in the background of above position in the different countries that it is essential to examine the position of the Indian Law. The question of immunity of a Foreign State and the extent of it in a particular country is essentially a matter for the Municipal Law of that particular country.

9. An indication as to what extent the Indian Law recognises the immunity of a Foreign State has to be found in the Code of Civil Procedure. Sections 83 to Section 87(b) provide for suits by Aliens and/or against Foreign Rulers (Ambassadors and Envoys) as well as suit by Foreign States. It is, therefore, necessary, to examine the effect of these provisions of the Code of Civil Procedure and how far and to what extent immunity has been granted and if there is no specific immunity granted in favour of Foreign State whether there is any question of immunity enjoyed by Foreign State in Indian Courts under any notions of international law. Section 84 of the Code of Civil Procedure lays down when a Foreign State may sue in any competent court in India. Section 85 of the Code of Civil Procedure pro-

vides for persons specifically appointed by the Government to prosecute or defend on behalf of the Foreign Rulers. Section 86 provides that no suit against a Ruler of a Foreign State can be instituted without the consent of the Central Government and it provides for contingencies where such consent can be given. It also makes this provision applicable to the Ambassadors and Envoys, High Commissioners of Commonwealth Countries and certain other specific representatives. Section 87 provides that the ruler of a Foreign State may sue and shall be sued in the name of his State. Section 87(a) defines the Foreign State as well as the Ruler of the Foreign State. Section 87(b) makes some of these provisions applicable to the Rulers of the former Indian States.

10. An examination of these provisions of the Code would indicate the following:—

- (a) That the Ruler of a Foreign State is an entity and notion distinct and **apart** from the Foreign State in the scheme provided in this Code.
- (b) There are limitations of contingencies when a Foreign State may sue in an Indian Court.
- (c) There is provision for suing the Ruler of a Foreign State with the consent of the Central Government and such consent has to be **given** prior to the institution of the suit and one of the conditions on which such consent may be given is that the Ruler of the Foreign State has submitted to the jurisdiction of the Courts in this country which must in the circumstances be a submission to the jurisdiction prior to the institution of the suit.
- (d) A ruler of a Foreign State shall be sued in the name of his State and he will also sue in the name of his state. It is arguable, therefore, that the Code does not provide:—
 - (i) When a Foreign State may be sued.

- (ii) That a suit against a Foreign State need not automatically and in all circumstances become a suit against the Ruler of a Foreign State.
- (iii) There is no provision of suing the Foreign State with the consent of the Central Government.

11. The question that arises for determination, therefore, is whether by providing for the Ruler of a Foreign State any provision has been made by implication regarding Foreign State itself in our law and further whether in view of the fact that there is no specific provision in the Code of Civil Procedure, Foreign States enjoy any immunity in the Indian Court, on any principles of international law and further if they do, the extent of their immunity.

12. The Supreme Court of India has considered the question of immunity of foreign states in the case of **Mirza Ali Akbar Kashani Vs. United Arab Republic** A.I.R. 1966 S.C. 230. The Supreme Court has held that the Civil Procedure Code lays down the complete law on the subject of sovereign immunity to the exclusion of the principles of international law. The Supreme Court was of the opinion that the effect of the provisions of Section 86(1) of the Code appears to be that it makes a statutory provision covering a field which would otherwise be covered by the doctrine of immunity under international law. On construction of sections 83 to 87B the Supreme Court held that the suit in question was barred by Section 86 of the Code. In that view of the matter the Court considered it unnecessary to deal with the other question as to whether the United Arab Republic was justified in claiming absolute immunity under international law.

13. The case went to the Supreme Court in appeal from a decision of the Calcutta High Court. The learned trial judge (Mr. Justice Ray in A.I.R. 1960 Cal. 768) had held that a suit against a 'foreign state' does not necessari-

ly become a suit against the ruler of that state. He was of the opinion that sections 83 to 87A of the Code deal only with suits by or against rulers of foreign states and these sections do not contemplate any consent being required as a condition precedent to the institution of the suit against a foreign state. The learned judge further came to the conclusion that there was no principle of absolute immunity, and that where the rule of law prevails the foreign state ought to be entitled to such immunity but no more as enjoyed by the domestic State before its own tribunal. He, therefore, has held that the United Arab Republic was not entitled to any immunity in the suit. From this decision the defendants went up in appeal to the Division Bench of the Calcutta High Court, [A.I.R. (1962) Calcutta 387]. The Division Bench held that a suit against the Foreign State cannot as a matter of law be treated as a suit against the ruler of that state, as such in the opinion of the Division Bench, Section 86 of the Code has no application. The Court, however, held that under international law as adopted by the Courts in India the United Arab Republic was entitled to claim immunity. Thereafter the Supreme Court pronounced as mentioned before. In the Annual Survey of the Indian Law 1966 (published by the Indian Law Institute, New Delhi) it has been observed "Thus the prospects which the judgement of the Calcutta High Court evoked for participation by our municipal courts in the elaboration of the international law rules of sovereign immunity were frustrated because of the total reliance by the Supreme Court on the statutory provision."

14. The Supreme Court in its judgement at page 235 observed "Reverting then to Section 86, there can be no difficulty in holding that when Section 86(1) refers to a Ruler of a foreign state, it refers to the Ruler in relation to the said State and means the person who is for the time being recognised by the Central Government to be head of that State.....the argument that the

head of a Republican State is not a Ruler of that State cannot be upheld." There is, however, another aspect of the matter. The head of a Republican form of government may be the Ruler of the State as contemplated under Section 86 of the Code and it may be that under Section 86 heads of both republican forms of governments as well as monarchical form of governments, were contemplated, yet it can be urged that Section 86 of the code does not contemplate suits against the Foreign States but contemplates suits against the heads of the foreign governments, be it the head of the republican form or the monarchical form. Further it may be argued that a suit against a Foreign State does not automatically become a suit against the head of that State. It is submitted that in the present context of things it is impossible to contend that a Ruler of the Foreign State or the head of the Foreign State is the same thing as the Foreign State itself. The state in the monarchical form of government may have no separate existence than that of its ruler (see Oppenheim's International Law, 8th Edition, Volume 1 pages 759, 762 and the utterance of Louis XIV "I am the State"). The position, however, is entirely different in a Republican form of government, for instance under the Constitution of India, America etc. If by interpretation of Section 86 of the Code, a suit against the government of United States is transformed into a suit against the President of the United States, who by the Constitution of that country cannot be sued, that would be a strange result indeed. For a discussion on this point reference may be made to the decision of *Wagner Vs. The United States* reported in (1867) L.R. 2 Ch. App. 582.

15. In India Government can be sued. That has been the position always. The Indian Law has been more rational on this point. Historically and under the Constitution the Government of India can be sued in its own courts (For a discussion on this see the case of *Calcutta Motor Cycle Co. Vs. Union of India* reported in 90 Calcutta Law Journal 25 at p. 42-45). The historical reasons for the immunity of the Foreign State as mentioned by Lord Denning do not, therefore, exist. It is further said that it is difficult to accept any principle on which the distinction between *jure gestionis* and *jure imperii* can be made. International Jurists like Lauterpacht and Lord Denning who advocate restriction of the principle of immunity for Foreign State on ground of *jure gestionis* recognise the difficulty of drawing the distinction specially where in welfare communities the States politically take responsibility for the economic well being of the multitudes. It is true that political actions of a Foreign State should not be made a matter for adjudication in Indian Courts. But it is submitted that the difficulty of the application of the distinction between "*jure gestionis*" and "*jure imperii*" on certain principle should not make the Indian Courts sterile on this point.

16. The problem is of some urgency in view of the fact that various foreign state-owned industries and institutions are participating in the development activities of the developing countries. A new appraisal of the whole situation is necessary—either by judicial re-examination or by legislation based on consensus of the international community.

Comparative Law : Its Study

By

Dr. B. N. Mukerjee, Principal (Offg),
University College of Law, Calcutta.

The Indian Law Institute organized on December 27 and 28, 1969, a two-day seminar of selected law teachers from all over India to discuss and exchange ideas on the subject of 'Comparative Law'. Professor C. J. Hamson of the University of Cambridge was also invited to associate himself with the seminar.

The reason for arranging this seminar was that, although the Bar Council of India has prescribed Legal Theory and Comparative Law as a compulsory subject for the LL.B. course, it is evident that "there is still vague thinking about the subject of Comparative Law and its scope for the LL.B. teaching". It appears that enquiries made as to the scope and extent of the subject could not elicit any reply.

According to the schedule of the seminar, the first day was devoted "to the consideration of the nature and scope of Comparative Law, the purpose for its study, and the contents of the 'Comparative Law' paper for the LL.B. course in India"; and the second day was kept for considering subjects for future research work on Comparative Law in India.

About thirty Indian professors of law participated actively in the seminar; and there was free and full exchange of ideas on the subject among them. In spite of long discussions for

two entire days the only consensus of opinion forthcoming was that it is desirable that law should be taught comparatively even at the LL. B. level, and that it is already being done in the fields of Constitutional Law (British, American and Indian) and Family Law (Hindu, Muslim, Parsee). It was also felt that our students are more comparative minded than foreign students, due, perhaps, to the existence of diverse elements in Indian culture. Endeavour should, therefore, be made to extend the area of comparison to cover other subjects, such as Contract, Criminal Law, etc.

For the present, it was considered sufficient for the LL.B. students to study Comparative Law as a part of the Legal Theory paper and tied to the subject of Jurisprudence as suggested by the Bar Council of India. For better training of future lawyers, however, it may be advisable for those law schools and universities which can afford it, to make available an independent Comparative Law paper as an optional subject for those LL.B. students who would care to take it as one of the requisite number of optional papers. These students would obviously be those who intend to pursue their legal studies more seriously. For the LL.M. course it was beyond controversy that Comparative Law is

an essential discipline today and must be included in the syllabus as an independent paper.

This is about all that collective thinking could produce at the Delhi seminar. But collective thinking like everything collective is a matter of compromise, and leaves the individuals' quests unfulfilled. Let us then withdraw from the seminar to solitude and put daring questions to ourselves.

Scope of Comparative Law

We must now ask ourselves the most fundamental question, even if we are unable to answer it at once; because, we must confess our own ignorance in order to gain credit to our candour. The question then is: What is Comparative Law and what is its scope?

Some jurists (Bryce, Holland, Jenks, Guttridge and Kaden) maintain that Comparative Law is a method of study rather than a branch of legal science. According to them comparison of different legal systems is a technique that can be employed in almost every branch of law; and unlike the branches of positive law it does not have a definite function in the life of society. Others, such as Saleilles, Lambert and Rabel, on the other hand, consider the subject to be a special branch of the science of law, and ascribe to Comparative Law a definite province at par with the other branches of positive law. When the doctors thus disagree what happens to the patient?

It may be permissible for the present to pass over the question: What is Comparative Law, and pass on to the more practical aspect of it, that is, its scope. If we are allowed to take this jump, we shall proceed to distinguish between the collation of facts by comparison and the utilization of the results of such collation. Clearly, it is idle to compare by curiosity alone without attempting to go beyond comparison. It is only upon going beyond, that the scope of Comparative Law reveals itself by being merged with the idea of utilization. Utilization would show the purpose; and purpose must chalk out

the scope. In other words, it is the particular purpose of utilization of Comparative Law that determines its scope. Therefore, a change of purpose will call for a change in scope of the subject.

Purpose of Comparative Law

Thus conceived, Comparative Law can serve a number of purposes, that is, functional utilities. These utilities are:—

(1) **General Improvement of knowledge of Law.** So far as jurisprudence is concerned, comparative method leads to a highly scientific study of law and towards the definition of law. If Escarra is right in saying that "Every man bears in himself the principle of law", a comparative method in the study of Jurisprudence must necessarily lead to a better understanding of the nature of law. Although the dispute as to the real nature of law is more than two thousand years old and would probably continue for many long years to come, a comparative approach to law as dealing with the conduct of the individual as a moral being on the one hand, and accepting society as the ultimate frame of reference for human conduct on the other, is bound to lead to a better understanding of the functions of law.

(2) **Condition precedent of better international legal situation.** A study of comparative law can lay the foundation on which to build some uniform Laws of Nations. If unification is utopian, harmonization is at least in the region of possibility. At any rate, it would be an attempt in the right direction, namely, that of better international understanding, reciprocity and co-operation.

(3) **Knowledge of 'the general principles of law recognized by civilized nations' which the International Court of Justice is required to apply under Article 38 of the Statute of that Court.** So far, such application has, according to some International Jurists, depended upon a hunch of the Judge rather than upon any scien-

tific determination and formulation of the general principles; although that hunch may have been based upon the legal system or systems with which that particular judge happened to be familiar.

(4) More effective communication among lawyers living in different systems of law. The shrinkage of the world due to technological advancement has led to an unprecedented expansion of international commerce, greater frequency of international marriages, more frequent changes of domicile, and setting up of more international organizations, e.g., Common Market. All these generate greater business contact among lawyers of different nations with different legal systems. Comparative Law study could minimise the scope of misunderstanding and facilitate more effective and ample communication among these professional men who are called upon to serve their clients in international complications.

(5) Understanding and improvement of one's own legal system. To see things in their true light we must see them from a distance. The study of an alien system or systems of law takes us away from ourselves for the time being and gives us a better perspective of our own laws. A study of Comparative Law should, therefore, be able to train those who are to shape the laws of their society in which every passing day brings new discoveries, new activities, new problems, new complexities, new sources of anxiety, fear and hope.

Need to Choose Purpose of Comparative Law

It is now obvious that the utilities of Comparative Law are many and varied. We must now decide upon a particular utility which should form the purpose of teaching the subject as a part of our legal education. Of course, all the utilities are in a sense interconnected; but for the limited objective of an educational course, whether for LL.M. degree of a University or for special training of lawyers and legal officers in Research Institutes and Training

Centres outside the University, we should isolate or, at least, emphasize only one as our purpose. Otherwise, it would not be possible to set the scope or lay down the course-content of the subject. The Bar Council of India has tackled Comparative Law with Jurisprudence. The obvious conclusion is that it has desired to give a better conception of the nature of law to the LL.B. students. This is then the purpose.

Although this particular purpose is no doubt laudable in itself and would be extremely suitable for a developed Western country, for India it is hardly the need of the day. India should now engage in a nation-wide effort to make its legal education, legal profession and the substance of the law more relevant to its developmental needs. There should not only be immediate reform of its laws and legal institutions, the system of legal education must also be so designed as to replace the traditional method of formal and abstract approach to the teaching of law by methods that are problem-oriented, dynamic and conscious of the legal experience and practice of other countries. For the purpose of comparative study of law in India emphasis should, therefore, fall on the last item in our list of utilities, namely, understanding the improvement of our own legal system. Having arrived at the purpose, our next thought should be upon the method, i.e., what to teach and how to teach.

Method of Comparative Study

If we leave our the jurisprudential comparative study, for the present, as being too sophisticated and also more pertinent to a developed country of the West, we can think of at least three other appropriate methods which may be suitable for, and relevant to, our purposes. The first method would be to take a particular subject, say Contract, and pursue its study in one foreign system along with our own. The second alternative method would be to study in depth an aspect of the law of Contract, e.g., the notion of Consideration, in a number of foreign legal systems. The same two alternatives are, of

course, available for any other subject which we may consider more appropriate to compare, depending on our immediate social need. Labour Law, Taxation Law, Administrative Law, Criminal Law, etc., for example, may yield useful results out of such comparison. A third method would be one which is problem oriented. It will have a bias for the pragmatic; and the elements of comparison may encompass a whole subject or a topic or even an institution; but always with a practical problem in view, whose solution is expected to result from such comparison.

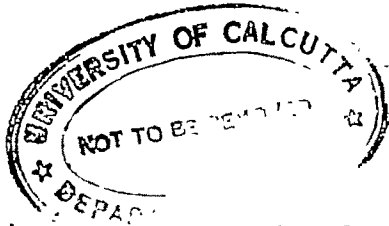
But in every case care should be taken in choosing the foreign system so that the system may be sufficiently near and yet distinctly different from our own; otherwise, there may not be adequate scope for comparability. The Common Law system, for example, is not sufficiently foreign to us to admit of fruitful comparison; because Common Law with alterations is indeed a part of Indian life today. We have not simply borrowed from this system of law; there has really been a wholesale reception and assimilation of Common Law in India. Therefore, a comparative study of Indian Legal system with the English or the American system is less likely to yield exciting and useful results, especially in the field of public law. In this connection it may be noted that in England they do not undertake comparative study with the laws of U.S.A., both being countries under the Common Law system.

If Common Law is too near to us, can we choose the Socialist Law, e.g., Soviet law, as a system for comparison? It is certainly distinctly different from our own. But is it sufficiently near? In India the accepted conception of the origin and purpose of law is that it has been created in heaven and that law is a means of achieving justice. In sharp contrast to this, law in the Communist world is neither given by

God nor depends on human will, but is peculiar to Nature itself. It is a means of oppressing the exploited class, and is necessarily unjust. Law, according to this view, is really a negation of justice. Now, can we call this attitude sufficiently near or akin to ours? Or, in other words, is a system of law born of such philosophic attitude sufficiently near our own system to admit of fruitful comparison? Don't they diverge too soon? The answer must be clear to everyone.

Fortunately, however, the Soviet system of law has taken so much from the European Civil Law system, that it cannot be said to be born entirely of the philosophy of Marx and Engels. Therefore, if our method of approach to comparative study be problem-oriented, it may yet be very relevant—especially if the problem is a modern one—to compare it with the Socialist system of the U.S.S.R. and also the Civil Law system of France. Take, for instance, the concept of property in urban areas of these two countries. The concept of property is as old as civilization itself, and perhaps older. But the question whether this concept has undergone any change in relation to urban property is pretty new; and a study of this concept under the Social and the Civil Law systems may yield results which may prove useful in our own problems of urban development and urban renewal.

None of the Indian Law Schools or Universities, as far as we could gather, have yet taken up this type of urgent work. Are there no educational, training or research institutions outside the Universities that may come forward and engage themselves in this fruitful comparative legal study? It is to be hoped, however, that Universities, Law Schools and other Institutions will soon realise the need of such comparative legal education and research so that they may play a meaningful role in the development of law and legal institutions in the country.



Shortcomings Of The Indian Companies Act.

By

S. C. Sen, Barrister-at-Law and Senior Advocate.

In order to assess the shortcomings of the Indian Companies Act it is necessary to proceed by stages. The three stages that are necessary in this connection are to ascertain—

- (i) what is the purpose of law ;
- (ii) what Company Law should be ; and
- (iii) what the Indian Company Law is.

The purpose of Law.

The original purpose of law was that there had to be rules of social conduct in a simple society. The original human society was small, simple and basically agricultural. The rules of social conduct in such a simple society were very often mixed up with religious commands. The Ten Commandments were not really the voice of God but it was the voice of law. When a man was told "Thou shall not steal" he was not listening to the voice of religion but to the voice of law.

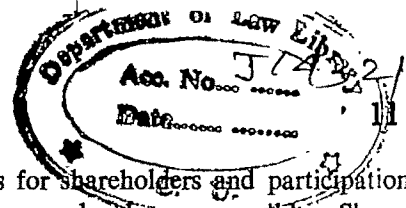
With the progress of civilisation complications set in. Villages were replaced by towns and cities and the agricultural background was very often replaced by industrial background. The society ceased to be a simple society but it became an urban society, sophisticated, complex and with various complicated economic problems. The 20th century law could no longer be the simple rule of social conduct for a simple society. Dean Roscoe Pound enunciated the new definition of 20th century law. According to him law was an instrument of social engineering. Modern law is very different from the original law and this must necessarily be so because

of the change of social dimensions. In modern law the emphasis has shifted from central to creating an atmosphere where society's needs are fulfilled. It can roughly be equated to the Kenysian approach that when a suitable economic atmosphere is created, the normal energy of private enterprise thrives in that atmosphere and benefits the community. The creation of such an atmosphere for the benefits of society is the function of modern law as an instrument of social engineering.

What Company Law should be.

The history of company law is itself an illustration of Roscoe Pound's theory. The evolution of company law itself proves to what extent company law has been an instrument of social engineering and also indicates what company law should be.

The development of companies in Europe can be traced to the 13th century in the trade guilds. These guilds were trading groups who formed themselves into guilds or associations for the protection of their trading interests. With the development of foreign trade these guilds became important. Foreign trade had to be carried on under a monopoly permit granted by the King. Monopoly was the pattern of the then trading. But instead of granting this permission to an individual the King granted it to guild or groups. Royal Charters used to be granted and under these charters the guilds were given legal recognition as a corporation. They



were given perpetual succession and a common seal and became incorporated or legally personified. The association as distinct from its members was a fact and granting of the incorporation was a legal recognition of all existing fact. The royal charters therefore filled in a social need of giving a boost to collective efforts and as a piece of social engineering fulfilled the need of the community for collective efforts and created the atmosphere for further collective efforts for the benefit of the community. It was as a result of these charters that very important things happened in English history. The formation of the British Empire in the East was the result of granting of the charter to the East India Company which "in a moment of inadvertance" annexed an empire. The Levant company controlled British foreign policy in Near East.

The next step in the development of company law was the enactment of Companies Acts whereby incorporation became possible by simple registration and the necessity of a charter from the King was dispensed with. The privilege of obtaining charter was necessarily easier for persons who had access to the King or the Court. By making incorporation possible through a simple registration this privilege was extended to all instead of the privileged few. It eliminated influence with the Government or need of any help from government officials. The situation again was created under which as a piece of social engineering the company law made it easier for the people to have collective efforts through an incorporated body and thereby encouraged the growth of trade and industry.

The next step was the granting of limited liability to shareholders. It is generally not known that limited liability was not in the original concept of companies. The battle for limited liability was waged for a long time and it was only about 1855 that the benefit of limited liability was granted to shareholders. As a piece of social engineering this was a wonderful innovation. It

eliminated risks for shareholders and participation by much larger number became possible. Shareholders would put the money in the company in their faith in the entrepreneurs and thus began the genesis of modern company managers and modern stock-holders.

The next most important development was the recognition of the Stock Exchanges. The Stock exchanges originally started as the business forum where shares were sold and purchased. The stock exchanges acted as a great advertising agency for boosting up business transactions. There were certainly manipulations by dishonest traders as was evidenced by the great South Sea Bubble. Government control and supervision over every individual act of numerous corporations would have been a mechanical impossibility and as such impracticable. Recognition of the stock exchanges and of their right to send shares off the list of quoted shares created a tribunal under which self-policing and self-correction became possible. By and large the self-correcting mechanism of the stock exchanges succeeded and a high moral standard was set up by the stock exchange authorities which acted as a deterrent to manipulation by dishonest traders. Group enterprise thereby created its own medicines against economic maladies.

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The way was thus paved for the rise of the greatest phenomenon of the 20th century's economics, viz., the giant corporations. Across the Atlantic in the United States industrial revolution came in tremendous proportions. Giant companies sprung up whose properties amounted to economic empires. The shares were sold large in number so that no individual or group could hold any control in shares. In some of the largest companies the management held only a minute proportion of the total shares, in some cases, even less than 1.5% of the total issue. Thus came what is known as the divorce of ownership from control. This also made possible the rise of modern technocrats and profes-

sional business managers who managed business without ownership of controlling shares. It was entrustment of powers to people who were not the owners but professional business managers.

The new sense of power also saddled the management with new sense of responsibility. In the modern corporation the share-holding is not limited to a few. The whole community participates in the holding. In the United States about 14 per cent of the total population are stock-holders in some company or other. The suppliers, the retailers, the workers, they are now all interested in the company. The modern corporation is one of the most important things in the economics of a modern State. In the new state of affairs the management learned to manage things with a sense of social responsibility and thus developed what is known as a King's conscience in corporate management. It is the conscience of the benevolent King who has absolute powers but knows how to use his powers for the benefit of the community. His conscience is his own guardian. As a result of this was born the massive foundations in the United States like the Rockefeller Foundation, the Ford Foundation and the Carnegie Foundation which donated millions of dollars for the benefit of the community.

The modern giant corporation has demonstrated the power of modern capitalism. Capitalism had two evil wings, monopoly and its tendency to exploit labour. With these two wings clipped the modern capitalism, which I have called in an article "Capitalism with clipped wings" moved in the correct direction for the benefit of the community. This is the metamorphosis of the corporation and creeping capitalism became galloping socialism of a non-marxist variety. This is modern capitalism's answer to Marxism. (This subject has been fully dealt with in my article "Metamorphosis of the Corporation" in the book called "Company Actions in the Modern Set-Up" published by Eastern Law House Private Ltd.).

What the Indian Company Law is and what are its shortcomings.

We now come to a discussion as to what are the shortcomings of the Indian Company Law in the light of the two previous discussions, what is the purpose of law and what the proper Company Law should be. It is unnecessary to go into details. It is much better to deal with the overall subject. We have taken pride in publishing a so-called philosophy of the Indian Company Law. In my opinion, analysis of the philosophy shows what I would like to call the Trisul (Trident) Philosophy. It is a Trisul because it has three prongs, sharp and lacerating violently the heart of Indian corporate sector.

The three prongs of this philosophy are three illogical basic presumptions:—

- (1) "An irrebuttable presumption" that every corporate manager or controller in the private sector must be dishonest.
- (2) A divine wisdom thereby and a super-papal infallibility of bureaucrats and politicians.
- (3) An illogical fiction that stock-holders are perpetual invalids or congenital idiots who are incapable of looking after their own interests and must be under the perpetual guardianship of a Government agency.

The presumption of dishonesty theory.

The corporate sector is the highest tax-payer of the country and is a fine tribute that they have to be treated as criminals. The approach of the Government is the approach of the headmaster of a Borstal School. The treatment meted out to business managers is as if they are all criminal juvenile delinquents and must be treated as such. A Star Chamber inquisition is held in Delhi where all sorts of enquiries are made, relevant or irrelevant. The law imposes a Government control over routine business

matter. Appointment of managing directors, whole-time directors, sole-selling agents, purchase of shares, all have to be under a scrutiny. The greatest drawback of the system is that it does not discriminate between the honest man and the dishonest man. If at all, the dishonest man with his own contactman finds it easier to have dealings with the Government departments. The honest man is at a great disadvantage. The system takes away from him his pride in his honesty and puts him on the same pedestal as the dishonest operator.

It is a thing which has dangerous repercussions. Take away from a man his pride in honesty and he has nothing to lose by being dishonest. His incentive of being honest is gone. In the net result an atmosphere has come into existence where honesty is at a disadvantage and finds it difficult to survive. According to the rules of Darwin, this atmosphere will kill the honest people who will not change with the new environment. In other words, it has now become a State-sponsored movement for spread of dishonesty or what may be called "The Movement for Moral Disarmament of the Corporate Sector".

Let us now test the second presumption—**The divine right and papal infallibility theory.** Business management is not the home ground of the bureaucrats. Modern business is not a simple job. Anybody who knows something from the Harvard School of Business Management knows the intricacies of the science of business management. The practical laboratory of this science is the rough business world. It is only out of long contact with the rough competitive business world that business wisdom is born. Business wisdom does not grow in the air-conditioned cocoons in New Delhi.

To be fair to the bureaucrats, this power was not of their seeking. This power was imposed on them by a group of politicians who wanted to have control of everything by vicarious methods. This power was granted to the

bureaucracy because the politicians wanted to have indirect control through the smoke-screen of bureaucrats. The bureaucrats never had real chances to be efficient. They had no security of tenure in a particular department and they are not given the time to learn something adequately, particularly when a thing is as complex as business management in the modern days. A bureaucrat is perpetually playing the musical chair game. Today he is in steel, tomorrow he is in revenue, third day he is in education, fourth day he is in company administration, fifth day he is in shipping and this goes on. It is impossible to expect efficiency out of a bureaucratic Jack of All Trades and Master of None, which must inevitably be the lot of a bureaucrat who is not even given the opportunity to learn something properly over a length of time. Things are made more difficult by him because of the behind-the-scene promptings of the politicians. Security of his tenure and his personal interest would prevent a bureaucrat from continually flouting the politicians who behind the scene are prompting him to make decisions not on the basis of commercial probity but on the basis of political considerations and considerations in which one or other of the politicians may be involved. A system based on these cannot possibly be either efficient or even honest.

Let us test the third theory—**The shareholders, idiocy theory.** The history of the development of companies shows that this is a facet of human life where individual and group enterprises act for the benefit of the community. The basis of a company is individual and group enterprise uninterfered by Government restrictions. Efficiency increases because of competition and the basis of competition is quick decision, new decisions where one proves his greater efficiency over the others. Imposition of control over routine business matters militates against the very basis of individual and group enterprises and competition and is an illogical introduction in the development of companies. This particular theory

loses sight of the most important thing that the best Government is the Government that governs least. We have too much government and too many people invading other people's business. This theory makes it impossible to have machinery for self correction. In any view, it is also illogical for another reason. We in this country preach democracy. But while we all the time ask for political democracy, we deny the democratic right in the same society. Federalism and self-Government is the spirit of the age and the self-Government or federalism is not to be confined only to political life but also to economic life. What we find today is an economic authoritative regime in a politically democratic society. It is a pull in two different directions and we do not expect economic progress out of this absurd state of affairs.

Today the corporate power of India is a gagged power, a power of tremendous potentialities, but bound hand and feet by controls, permits, restrictions and unable to move, watching helplessly at this country with its infinite prospects making a steady progress towards industrial recession and national bankruptcy. Sometimes it reminds one of Shelly's 'Prometheus Bound' when one finds the corporate sector in this stage. The Indian corporate sector is now

a Prometheus Bound with the twin vultures of taxation and controls nibbling at its heart.

Need for change.

There is a need for change. If the nation is to survive, the corporate sector must be given a new lease of life and the outlook has to be changed. This ante-fraud obsession must be changed. Where fraud is apprehended or fraud is practical there is enough law in this country to take care of that. If necessary, increase the emergency powers like powers of inspection or power to punish the guilty, but do not brand the corporate sector as manned by all dishonest people not worthy of any trust. The basic thinking of the so-called philosophy should be reoriented. Judge Brandies of the United States Supreme Court once said that electric light is the best police man and sun light the best disinfectant. For disinfecting the disease of the corporate sector, which is apprehended, the medicine should be more or more disclosure which is also the view accepted all over the world. But to give it efficiency, we should remove the shackles which now cripple the corporate sector. The cry should be "less control more disclosure". This is the only way by which a speedy expansion of the trade and industries of this country can be achieved and this is an urgent need of the nation.

Does Muslim Personal Law Require Any Change ?

By

Hon'ble Mr. Justice S. A. Masud, Judge,
Calcutta High Court.

In recent years it is often heard, not without reason, that there should be one uniform Civil Code applicable to all the citizens in India. In fact Article 44 of our Constitution provides for the same. The said provision is one of the many directive principles which have been enumerated in part IV of the Constitution. But there are some directive principles which are more fundamental and which should be given a greater priority in their implementation than others. To illustrate, Article 39(a) provides that the citizens have the right to an adequate means of livelihood. Article 43 contemplates a living-wage for all the workers, agricultural, industrial or otherwise. Similarly under Article 45 there is a provision for free and compulsory education for children. The greatest problem in our country is eradication of poverty of the teeming millions who are denied the bare necessities of life. Until the economic independence of each individual is achieved, the political independence would be a cruel joke to the hungry people. The demand for a uniform Civil Code is certainly a progressive demand which requires to be fulfilled in a modern welfare state. But, at the same, like the past, we should not create innumerable problems by attempting to solve only one problem. Partition of the Indian sub-continent might have effected a temporary imperialistic solution of the prevailing distrust between Hindu and Muslim in pre-partition period, but it has caused untold sufferings not only to the refugees and displaced persons but also a new kind of exploitation in

the shape of a hegemony of oligarchy over the millions of poor and helpless men and women. Similarly without even making any earnest effort of improving the standard of life among the rural and urban workers and people belonging to lower middle-class, aggressive demands were made for division of our truncated country into linguistic states. This process of division, which is still continuing, caused loss of lives and also created wounds in the minds of Indian citizens as a whole which would take a long period to heal. It is from this background the legislators should proceed cautiously before rushing through an enactment of uniform Civil Code for all citizens.

It cannot be denied that any progressive legislation would establish national integration and infuse a sense of equality in the shape of sharing common advantages and disadvantages, rights and liabilities among all citizens. In fact excepting the Hindu, Muslim and Parsi personal laws, there are already uniform civil and criminal laws which are applicable to Indian citizens, irrespective of caste, creed and community. Our foreign rulers avoided a common legislation on personal law on the grounds that such an attempt might be construed as interference with the religious freedom of the Indians. It should be remembered that the personal laws are claimed to be mainly based on religious text-books and also the learned commentators who have been respected by their respective co-religionists for ages. Our country, having a Constitution secular in character, can-

not allow the members of a community or their leaders to have a grievance against the government which might take violent and aggressive turn and which situation might be used by foreign countries for maligning India. But such an apprehension or possible reaction cannot stand in the way of the progress and welfare of the citizens as a whole. The abolition of the burning of the widows of the Hindus in the funeral fires of their husbands known as "Satidaha", the amendment of the legislation of Hindu Law of Inheritance in 1956, the dissolution of the Muslim Marriage Act in 1930 and many other progressive legislation would not have been passed and caused benefits to the people as a whole if the government did not have the courage to introduce the same for the welfare and well-being of Indian people. Law after-all is the pulse of the people and if the people concerned want a change in their personal laws they can have them put through with their representatives in Parliament or the State Legislatures. In fact, long before 1956 the Sanatanists opposed any change in Hindu Law in the matters of law regarding divorce and the members of the Parliament found merits in such opposition and the necessary law could not be passed. But members of Parliament in 1956 were progressive enough to appreciate the exigencies of the society and agreed to change Hindu personal law relating to divorce. Similarly a time might come when the members of the Muslim community may themselves want a uniform Civil Code or a substantial change in their personal law. In fact, many acts affecting Muslim personal law relating to wakfs, divorce and religious practices like Muslim wakfs. Validity Act, the Dissolution of Muslim Marriage Act, Shariat Act have been passed without much opposition.

There is another difficulty of having uniform Civil Code for all Indians, because a particular law has nexus with not only religious and traditional writings or discourses but also has other indispensable adjuncts which form an integral

part of the particular law which is proposed to be changed. To illustrate, in Hindu Law there is no question of any payment of dower at the time of divorce whereas in Mohammaden Law every wife is entitled to get at the time of divorce a substantial sum of money which is fixed and settled at the time of the marriage. Now this concept is unknown to Hindu Law. Thus if all divorces form part of a uniform Civil Code the result would be that Muslim wives would be getting divorce without any dower which provides for her future maintenance. Similarly, a Hindu cannot be compelled to pay a fixed sum of money to his divorced wife at the time of divorce. Again, the doctrine of Oblation or Pinda is unknown in Muslim Law and, therefore, Muslims cannot be compelled to have a law relating to adoption, if adoption is one of the subjects which is included in the proposed uniform Code. There are many other complications in Muslim Law of Inheritance which are different from the law among the Hindus. As stated earlier, the difficulties mentioned above, however, cannot and should not prevent a legislation which might be beneficial to the people for whom legislation is made. It is in the interest of the Muslims to have a change in their law relating to some of their personal laws. A Muslim is allowed in law to have four wives at a time. This law had a history of its own. On account of war many soldiers lost their lives and the widows and unmarried girls in the country were larger in number than the male population. It was to meet such a contingency Islam permitted a Muslim to marry 4 times. The idea was to avoid promiscuous sexual relation and sufferings of the parents of the unmarried girls and young widows. Further from the historical point of view many in those days were used to marry many times. It was thought that a restriction to 4 wives was a healthy golden limit. In the modern days those situations are not prevailing and for economic reasons, if not for other grounds, common man can rarely afford

Image of the Goddess of Learning



University College of Law Union maintained it's tradition by Successfully Organising the Saraswati Puja within the University Campus.

to have more than one wife. But some unscrupulous men take advantage of this law and cause sufferings to their wives on account of their wealth or in the hope of getting inheritance from the side of the wives. They forget that one of the fundamental tenets of Islam is that a Muslim is allowed to marry four times only if he can treat all the four wives equally. In modern age women being femasole and also psychologically conscious of their rights such a treatment is difficult, if not impossible. It is, therefore, necessary that a law should be passed whereby a Muslim can be allowed to marry again during the lifetime of his wife after he gets the necessary sanction from the Court. It is quite possible that the court would grant sanction if it is satisfied that the man has no child through his first wife or on some other reasonable ground.

Similarly, a Muslim husband should be allowed to divorce his wife orally without the intervention of the court. In these days of unemployment and high price-index, a divorced woman would be helpless in the society inas-

much as it is difficult for her to get a second husband. Further, there is no provision for maintenance in Mohammeden Low for a divorced wife. As in the case of a woman, a Muslim husband should also be allowed to divorce his wife only through legal proceedings in court. Necessary legislation should be enacted for the said purpose.

Lastly amendment of the law of inheritance is necessary whereby many heirs like the predeceased son's son should be allowed to inherit the properties of the predecessors in interest where the Muslim Law has not provided for the same.

In conclusion it should be remembered that the society or community can only be progressive if legislations are made in accordance with the requirements of a particular age. A hasty legislation on the basis of a political exigency would destroy the fundamental fabric of a particular legal system but at the same time on the pretext of maintaining stability of law, a dogmatic attitude opposing all changes should be condemned.

"What The Dog Said"

By

Mr. Justice S. N. Bagchi, Judge, Calcutta High Court.

The Supreme Court Decision in Abdul Razak Vs. State of Maharashtra, reported in A.I.R. 1970 S.C. 283, reminds the legal world of Mr. Justice Stareleigh and dicta in the case of Bardell Vs. Pickwick (reported only in Dickens, Pickwick Papers, c. 34) where he observed that "what the soldier said" is not evidence" and so gave the legal profession the handy phrase, "what the soldier said," as a synonym for "evidence inadmissible on the ground of hearsay."

In the Supreme Court case, the appellant Abdul Razak was a Railway gangman. On 9th October, 1966, on the railway line over which Poona-Wasco Express train was running in the mid night, there was an accidental derailment of the train. The engine driver, guard, and one police constable searched and found the affected Rail line joint near which had fallen the removed fish plates, nuts, bolts, keys and jaws scattered in undamaged condition. There was also another fish plate and one nut fallen on embankment in undamaged condition. Upon information lodged, the police started investigation.

Police seized the things lying at the spot near the scene of offence. On 10th October, 1966, at 7 a.m. all gangmen including the appellant who were engaged on duty during the whole of the day of October, 1966, were assembled near the bridge, and were interrogated by the police. At night at about 8-30 p.m., near the spot of the accident the police dog "Sheru" of C.I.D. Poona was brought. Abdul Razak and five other

persons were made to stand in a row facing the rail line in the presence of witnesses. The police dog "Sheru" was made to smell the affected joint on the railway line. The leading strap was held by the controller of the dog. The dog after smelling the articles near the affected joint went towards the embankment where one fish plate was lying, smelt it and then went to the row of persons, and smelling two persons smelt the appellant (Razak) also, and pounced upon him with its forelegs resting on the chest of the appellant. On 17th October, 1966, the appellant offered to produce the spanner from the place where he had hidden it near the railway track. He led the witnesses and police officers to the place and there dug out the earth, took out the spanner, and produced it. On October 29, 1966, the appellant made a confession before a Magistrate. He was chargesheeted and pleaded not guilty to the charge. The trial court convicted the appellant taking into consideration the identification of the appellant by the dog "Sheru" besides other evidence. The High Court accepted the prosecution evidence including identification of the appellant by the dog "Sheru."

Their Lordships of the Supreme Court at page 286 of the report observed that in Canada and in Scotland the evidence of tracker dogs has been admitted, but in the United States there are conflicting decisions.

The Supreme Court at page 287 of the report discussed canine habits and intelligence and observed :—

"But Dogs are intelligent animals with many thought processes similar to the thought processes of human beings, and wherever you find that thought processes, there is always the risk of error, deception and even self-deception. For these reasons we are of the opinion that in the present state of scientific knowledge evidence of dog tracking, even if admissible, is not ordinarily of much weight."

The earliest record of canine participation in legal proceedings was the Case of Aubry's Dog in France in 1371. After Aubry de Mondidier had been found murdered, it was noticed that his dog "Dragon" showed an unwonted animosity to one Richard de Macaire and it was arranged that "Dragon" should appeal Richard. A judicial combat followed in which Dragon killed Richard, who confessed the crime with his dying breath. It has to be conceded that this cannot be regarded as an instance of a dog giving evidence, though if the solemnities were properly observed "Dragon" must have taken the customary oaths.

In *R. Vs. Montgomery and others* (1968 North Ireland Report, page 166) identification of the accused by the police tracker dog "Rocky", the second, came up for consideration. Before the trial Court the accused objected to the admissibility of the tracker dog's evidence on the ground of hearsay. The Court of Criminal Appeal ruled that the evidence of the constable who handled Rocky, the second, on his tracking and who reported the dog's reactions was properly admitted. The Court did not regard this evidence as a species of hearsay—indeed, the word "hearsay" finds no place in the judgment—but instead the dog was described as "a tracking instrument" and the handler was regarded as reporting the movements of the instrument, in the same way that a constable in a traffic case might have reported on the behaviour of his speedometer (*The Law Quarterly Review* Vol. 82, July, 1966, page 312).

A witness who testified in court that he had

tracked a man by footprints or bloodstains, or even by sight at a distance, would expect to have the reliability of his evidence severely tested in cross-examination, but there is no way in which the weaknesses of the dog's evidence can be probed. We habitually describe frail evidence as "evidence on which one would not hang a dog." Perhaps in canine circles they regard tracker evidence as "evidence on which one would not hang a man."

Sometimes in Courts of law in cases involving direct participation of animals in causing either bodily injuries to human beings, or mischief to properties, or accidents, the character or disposition of an animal becomes no less relevant than that of a human being indicating its probable conduct on a particular occasion and is open to none of the objections which affect the use of a party's character. It is, therefore, commonly conceded to be admissible as a piece of evidence when testified to by a person as a witness, in case where the issue is as to the character of an animal such as viciousness of a horse or the habit of a dog to attack passing teams is admissible to show that the horse or the dog did a particular mischief for which its owner is called upon in a court of law to stand judicial investigation either in a civil or a criminal court. (Wigmore On Evidence Vol. I, Third Edition, page 491) Wigmore observes :—

"The hesitation sometimes observed has been due to the time at which the disposition is predicated in the offer, but as with human character, the existence of a trait at a given time is the evidence that it existed also for a reasonable time before and after an incident and within liberal limits, should, therefore, be received. Character of a horse after an accident was admitted in evidence to prove whether a horse was unmanagable and what his disposition was before and after the incident. The reason in one case, *Chamberlain vs. Erfield* 43 N.N. 356, 360 for admission of evidence of character of a

horse after Eight months of the incident was expressed in these terms "it may be safely laid down as a general rule (having its exception no doubt) neither horses nor men entirely change their character, their habits or manner at that space of time" (page 491, Wigmore On Evidence, Vol. 1 3rd. Edition)."

Conduct of animals as evidencing human acts demands consideration in relevant cases by the Court of law. If the instinct or habit of animals can, in a given case, be supposed to be sensitive to the dealing of men with them, it would seem that the conduct of an animal may be trusted evidentially as indicating the human act which would naturally have caused the animal's conduct.

In More's "Life of Sir Thomas More" quoted in Campbell's "Lives of the Chancellors" Vol. II, 37—there is a reference of a case in which a beggar woman claimed a dog to be her own which was bought by the Chancellor's wife from a thief. The Chancellor allowed the beggar woman to prove that it was her dog by the dog's recognition of the beggar woman. If a particular animal implicitly acquired a trick or other action expressly taught during his past association with a particular person, the possession of such a trick by a given animal will, therefore, be, in case of identity of the animal being in issue, established that it was of the person who claims it to be his. In Indian Courts, experience tells us that evidential use of an animal's peculiar and particular conduct and disposition has been an established practice, as in America and England. Evidence of tracking of the suspect by blood hounds was considered in different States of America in a number of cases, and in some cases such evidence was held admissible, and even reliable, but in others, not.

In *Pedigo Vs. Commonwealth*—a case in Kentucky State—103 Ky 41, 44 S.W. 143—(quoted at page 635 Vol. I, Wigmore On Evidence, Third Edition) Du Relle, J, held tracker dog's

evidence admissible, but laid down a few strict rules relating to admission of such evidence. He said "It is difficult to lay down a general rule as to the introduction of this kind of evidence. We think it may be safely laid down that, in order to make such testimony competent, even when it is shown that the dog is of (a) pure blood, and (b) of stock, characterised by acuteness of scent and power discrimination, (c) it must be proved that the particular dog i.e., the tracker dog employed—possessed those qualities and (d) has been trained or tested in its exercise in the tracking of human beings and (e) these facts must appear from the testimony of some person who has personal knowledge thereof. We think, it must also appear (f) that the dog so trained and tested was laid on the trail, whether visible or not, concerning which testimony has been admitted at a point where circumstances tend clearly to show that the guilty party had been, or upon a track which circumstances indicated to have been made by him." *Pedigo Case* was decided in 1898 laying down strict rules relating to conditions to be satisfied before admission of a tracker dog's tracking evidence, when testified to by a person having his proved competency to testify. Cases in which the strict rules, laid down in *Pedigo Case* in 1898, were fully satisfied, evidence of a tracker dog's identification of a criminal was admitted in States of Minnesota, Mississippi Nebraska, North Carolina, Ohio, South Carolina (see cases collected in Wigmore, *ibid*, page 635, 676). Wigmore observes "Courts do well to insist on the strictest fulfilment of the conditions of admissibility laid down in *Pedigo's Cases*." (*ibid*—637.).

The use of testimony that a blood hound after smelling an article of clothing which had been worn by a person, followed the scent and tracked down that person is not uncommon. Edmund M. Morgan in his "Basic Problems of Evidence" (September, 1962, American Law Institute, page 205) observes that a favoured treatment of the tracker dog's identification evidence was found in *Pedigo's case* already dis-

cussed. The breeding, training and skill of the dog must first be proved before the trial Judge. The learned author observes that a detailed discussion as to the admissibility and weight of a tracker dog's evidence would be found in *Berth Vs. State* 77 Oklahoma Cr. 17,138 P. 2d—115 (1943) also 94, American Law Report 407, 413 (1955). The learned author observes that a tracker dog's evidence should be received with caution. The privilege against self-incrimination has been construed to protect only disclosures of a testimony. The body of an accused may be freely used to incriminate on the identification of the tracker dog. So, the use of a tracker dog for identification of a criminal would not be hit by the Indian Law on "testimonial compulsion."

In the Supreme Court case discussed above, it does not appear that before the trial court evidence was led by a person competent to testify that "Sheru" the dog fulfilled all the conditions laid down in the rule in *Pedigo's* case discussed earlier. In regard to the admissibility and weight of the evidence of tracking by Sheru, the Supreme Court concluded observing at page 287 of the report (A.I.R. 1970, S. C. 283) "We are of the opinion that in the present state of scientific knowledge, evidence of dog tracking, even

if admissible, is not ordinarily of much weight." In *Pedigo's* case pre-requisite conditions have been laid down upon strict fulfilment of which evidence through the testimony of a competent witness may be admitted relating to tracking by a dog. The Supreme Court has not laid down any general rule relating to the admissibility of evidence of identification of an accused by a dog. But if in the case under report it was established before the trial court that the dog "Sheru" fulfilled to the letter all the conditions, as laid down in *Pedigo's* cases discussed earlier, and a competent witness testified that "Sheru" did so, the Supreme Court might have the occasion for making an authoritative pronouncement as to the rule of admissibility of the evidence of identification of an accused by a tracker dog. So, in a given case, when the question of admissibility of evidence of identification of an accused by a tracker dog arises, a Court may have to consider, before admission of such evidence, whether the conditions laid down in the rule in *Pedigo's* case have been to the letter fulfilled through the testimony of a competent witness. Future only knows how law relating to identification of an accused by a tracker dog would take its shape in the hands of the Supreme Court of India.

The Role of Judiciary as Makers of Law

By

The Hon'ble Mr. Justice Nikhil Chadra
Talukdar, Judge, High Court, Calcutta.

The role of judiciary in a welfare state is of great importance. It is undoubtedly a vital one and the judiciary has rightly been considered to be the champions of justice and the natural custodians of the lives and liberties of the people. In a democratic society, it is the force of law and not the law of force that must reign supreme and it is on the judiciary that is vested the onerous task of protecting, like the vestal fire, the liberties of the people. The citizens of the republic have given great powers to the judiciary and such great powers necessarily involve great responsibility. A reference in this context may be made to the wellknown observations of Lord Atkins in the case of **Liversidge... Applt. and Sir John Anderson & anr... Respdts.**, reported in 1942 Appeal Case page 206 that "Amid the clash of arms, the laws are not silent. They may be changed but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty.....that the judges are no respecters of persons and stand between the subject and any attempted encroachments on its liberty by the executive". Noble observations indeed by a noble Law Lord. The judiciary is indeed the corner-stone of liberty and the bulwark of democracy. Judges, therefore, have got a very responsible role to discharge in

deciding disputes between man and man, between the individual and the state and between the state and the state, dealing out evenhanded justice, as the guardians of the fundamental rights of the people and of the sanctity of the Constitution itself. In course of discharging its onerous task, the judiciary has to take into consideration manifold factors for the ends of justice. New social patterns cropping up in a welfare state pinpoint one such task. Dovetailing public policy and social needs into the bounds of the statute law is another crying need. A cloud has been raised by conflicting views on the proper role of the judiciary vis-a-vis the abovementioned needs in a changing society and one of the facets of the problem is the role of the judge as a law-maker.

The concept of fashioning laws in accordance with public policy, social needs and the convenience of the public is not really a new one but is as old as the hills. The need of progressive legislation and a progressive outlook on the part of the law-makers to dovetail into the changing pattern of times cannot be overemphasised. It has assumed now an added importance. Laws must progress with the progress of times and keep in tune with the requirements of the society. With the progress of civilization and the growth of the welfare state, the concept of

law and its outer periphery must extend so that it may keep pace with the mounting needs of the society. It is in this context that Mr. Justice Mccardie had observed in the case of *Ronald True*, reported in the *Notable British Trails*, Volume on *Ronald True* at page 236 that "All laws must progress or it must perish in the esteem of man". Where then to draw the line and how to prevent overlapping? While it is true that laws must progress with the progress of times and keep in tune with the requirements of the society, it is also true that the duties of the judiciary are well defined and one cannot overlap the other. The line must be drawn somewhere to highlight the role of judiciary in the context of social needs and public policy. In a recent treatise on **"The Judge as Law Maker"**, **Frederic Reynold** has observed that "decisions of the higher courts involving a conflict of opinion sometimes revolve in essence on questions of policy or social principle rather than on pure questions of law" and therein a reference has been made to the case of *MP Alister (or Donoghue) Pauper...Applt. and Stevenson...Respdt.*, reported in 1932 A.C. page 562. In that case the majority of the law Lords, viz., Lord Atkin, Lord Macmillan and Lord Thankerton declared themselves in favour of the manufacturer's liability, which was the subject-matter in that case, on the ground that it was morally and socially necessary and Lord Macmillan observed that "in the daily contacts of the social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows....The criterion of judgment must adjust and adapt itself to the changing circumstances". Social or moral principle has sometimes been put on a higher pedestal than a mere consideration of "pure law" in the decision making process of the judges. In a recent House of Lords decision in the case of *Shaw Vs. The Director of Public Prosecution* reported in 1962 A.C. page 220 (popularly known as the *Ladies Directory Case*), there has been a sharp conflict of opinion

between the Law Lords. The dissentient judgment came from Lord Reid, whose difference of opinion with the majority was sharp and fundamental. Lord Simonds delivered the "policy statement" on behalf of the majority and Lord Tucker delivered the judgment "in depth". Lord Tucker relied on the case of *R Vs. Delavel* reported in 1763(3) Burr. pp. 1432 and the observations of C. J. Lord Mansfield that "the court is the *custos morum* of the people and has the superintendency of offences *contra bonos mores*". Lord Simonds in his "policy statement" asserted, on the authority of Lord Mansfield, the power of the courts to superintend offences which are prejudicial to public welfare and not hitherto covered by statute and proceeded to pose the following question rhetorically: "Must we wait until Parliament finds time to deal with such conduct?" Lord Reid in his dissenting judgment answered emphatically and explicitly "yes".

The illuminating observations made in the two wellknown cases mentioned above are undoubtedly true to a degree but it has to be borne in mind that the bounds of a law-maker and of the judge are clear-cut and distinct and the overlapping of one with the other would lead on to confusion. Judges, as observed by Frederick Reynold, may be "hardly inclined to reason within a closed system of thought, nor at a level of abstract theory even when moral questions do not really impinge." When Mr. Justice Mccardie observed in the case of *Ronald True* that "all law must progress or it must perish in the esteem of man", the learned judge never meant that the existing laws shall be bypassed on the ground of new social principles or public policy. The duty of the court is to interpret the law as it is and not as it should be. It is not permissible again for the judiciary to take into consideration the inner-springs of human thoughts, prevailing at the time, interpreting the provisions of an existing statute in the light thereof. I agree with the observations of

Francis Bacon in this context that judges should dispose of cases "*jus dicere*"—in accordance with law as it is—and not "*jus dare*"—in accordance with law as it should be. All progressive laws are welcome and should be taken in their stride, for being interpreted by the

judiciary. Until such "progressive laws" are made, the court must continue to abide by the existing laws as otherwise it will enter into the realm of legislation: "*Fiat justitia ruat coelum*"—Let justice be done though the heavens should fall.

While fully appreciating the views of the learned author, we wish to add a few words. Undoubtedly the Judge is to interpret law as it is but the wisdom of a Judgment lies in the approach of the Judge to the problem posed. Social needs or public well-being should guide the Judge to find out if any different construction can be put upon a particular provision of a statute to subserve those objectives and for doing so, the Judge will not, perhaps, be condemned. After all, law is for the benefit of the society, not for its detriment and laws should progress not only through legislation but also through the process of interpretation by the judiciary. Rules of interpretation of statutes are not immutable and need not be taken to be well-settled for all times to come or uniform for all social systems. Why should a penal or a taxing statute receive different construction than others or why should the corporate veil be permitted to be lifted in certain circumstances? The reasons are well known and similar reasons should inspire and guide the judiciary in a developing democracy to mould the law in such a fashion as will enable the people to make progress and to march forward and not to feel oppressed by the traditionally conservative role of the judiciary. Role of judiciary in making laws in a developed democracy need not be rigidly followed by the judiciary in a developing and nascent democracy and rules of interpretation of laws to that extent may well vary. After all, law is for the society and not the society for the law. If a particular law is found to be deficient for the social needs, the judiciary may try to supply the defects if possible without doing serious violence to the law itself, otherwise the law itself should be condemned to stir the conscience of the legislators.

—EDITOR-IN-CHIEF

UNIVERSITY COLLEGE OF LAW UNION CALCUTTA

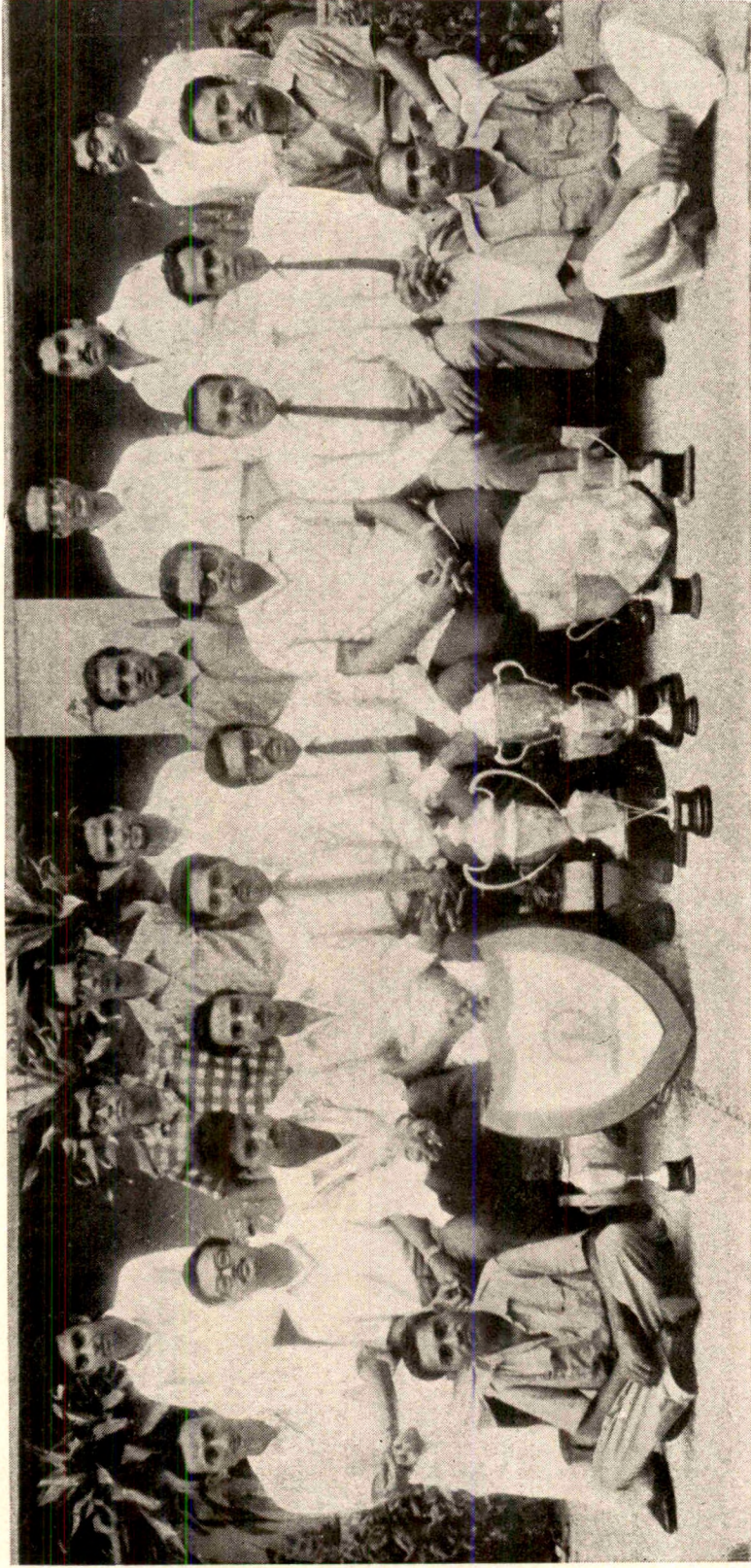
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Aftermath of the Abolition of Managing Agency

By

Prof. Sukumar Bhattacharya.

By the time this article appears in print, 31st March, 1970 will have passed and the system of managing agency in India will have been abolished. There being a considerable number of managing agency houses in this country who had been managing a large number of companies, one is apt to ask—"what will be the future set-up of the erstwhile managed companies?" A question that follows is—"what will be the fate of the managing agency houses?"

Time and again the merits and demerits of the managing agency system have been discussed and now that the fate is irrevocably sealed, it is futile to rake up that question again. But the large void created in the waters of trade by the sinking of the gigantic ship of managing agency has raised a maelstrom of turbulence in the said waters and this will take a considerable time to subside.

To understand the magnitude of the problem let a typical case be considered. M. Co. Ltd. were managing agents or secretaries and treasurers for fifteen companies engaged variously in the manufacture of tea, jute, paper, cotton textiles and engineering goods. Each of these fifteen companies had its individual Board of Directors, but not one of them had a whole-time director or an executive director. Nor had any of these managed companies any manager or secretary.

M. Co. Ltd., the Managing Agents, had been managing the affairs under the control of the respective Boards, and they had been supplying the various companies with the various services required for the proper administrative and technical control over the production and distribution of the respective goods. For the tea companies (say five in number) there was one Tea Taster in the Central Office, one or more accountants assisted by a number of clerks in the Central Office who were preparing the accounts, arranging for finance in the gardens, insurance of plant and machinery etc. Similarly for the jute mills (say another five in number) there were similarly people in the Central Office who were catering to the needs of the mills individually and collectively. The paper, cotton textiles and engineering units were also being looked after from a central office. All these persons were employees of M Co. Ltd.

There was one cash department in the Head Office which served the purposes not only of M Co. Ltd. but also of the managed companies. Similarly there was one centralised taxation department, one law and personnel department, one share and secretarial department.

With the abolition of the managing agency system, M Co. Ltd. cannot have a hand in the affairs of the managed companies any more.

What then should happen now? Most of the officers and men in the central office are employees of M Co. Ltd. With the work of M Co. Ltd. practically finished, it being assumed that such work consisted largely of the management of the affairs of the fifteen companies, what will be the fate of the employees of M Co. Ltd?

It may be suggested that the employees should now be distributed amongst the various companies. But here the problem may not be so easy of solution. Experience has shown that when a group of employees have been working as employees of a single unit, they are not happy at the idea of a division by which such singleness is broken and they become employees of different units. There are obvious reasons for this. The bargaining capacity of a union of a large number of persons is much larger than the bargaining capacity of a number of separate units having the same aggregate strength as before, but losing the right to present a joint front. The different companies will now be separate employers and they will concern themselves with the problems of their own, a tea company of Dooars having no interest in the affairs of the employees of a jute mill near Calcutta.

Let the case of the top administration be now considered. Each company will now require a whole-time director or a secretary or a manager. It can well be imagined how this will affect the total finance of all the companies taken together as compared to what the cost had been before the abolition of managing agency.

Each Tea company will now require a separate Tea Taster, whereas previously all of them together had enjoyed the services of one single Tea Taster.

If every item of additional expenditure occasioned by the abolition is taken into consideration, it will be found what a colossal amount will

be involved without there being any increase thereby in the production in the country, which after all, is the ultimate goal of all trading activities. The only redeeming feature, it can be so termed, will be that there will be an increase in the employment potential.

There have been some cases where a new service company has been formed which has stepped into the shoes of the erstwhile managing agents and has entered into agreements with the erstwhile managed companies for rendering services. But this system is not likely to be very much different from the old managing agency system, and if so, the mere dropping of the name 'Managing Agents' will not create any real difference. Apparently the Government is very much alive to this possibility and the dangers inherent therein, for, a recent announcement by the Minister for Commerce and Industries makes it clear that the Government will not allow the continuation of Managing Agency in the garb of "Advisers" to the companies. It appears therefore that there is no alternative to complete decentralisation of the power hitherto exercised by the Managing Agents and that each company will now have to work as an independent unit having its own administration and control.

Now comes the question of the erstwhile Managing Agents themselves. Their first problem will be concerning the employees who are bound to be found surplus because of the abolition of their main business namely the business of managing agency. It has been stated earlier that there is likely to be some difficulty in persuading the employees, specially where a Union exists, to accept employment from individual companies. Will this mean that the Managing Agents will have to retrench such unwilling people? But if a large number of persons have to be retrenched, it is likely to be found that the Managing Agency houses do not have the large amount of finance required to pay the necessary retrenchment compensation. Apart from the

question of finances, the situation likely to arise by throwing a large number of people out of employment is bound to give rise to a number of serious problems social as well as political in nature. It appears that the Government will have to step in and sponsor legislation by which distribution of the existing employees amongst the erstwhile managed companies can be achieved smoothly by a process of law.

What will the ex-managing agents do? As they are limited companies generally, the cases of limited companies only are considered here. Can they switch over to new lines of business? If the Objects Clause permits of the same and there is no attempt at liquidation on the ground that the main purpose of the company is over, perhaps it may be possible to start a new line of business. But the idea does not appear to be very popular. There have been some attempts by a few managing agency houses at diversification of activities, by acts of mergers and amalgamations. Generally, where such a thing has happened, the Managing Agents have absorbed within its fold one or more manufacturing units belonging to their managed companies. But here also the way is not all smooth, for the Government discourages any monopolistic growth which they fear may be brought about by attempts at large scale mergers. Every amalga-

mation proposal in respect of certain specific industries is already subject to Government approval, and it appears that the Government is likely to oppose such mergers in many cases.

Those houses, therefore, who can neither switch over to new ventures nor merge with others, the ways left open are either extinction or conversion into investment companies. In other words their prospects are bleak.

It is interesting to note here that although the system of managing agency has disappeared, the Banks, including the State Bank of India and the Nationalised Banks, still want the old managing agents to guarantee the repayment of a loan before they are prepared to sanction a loan to an erstwhile managed company. If now a Managing Agency house refuses to give such a guarantee, will the Banks refuse the loan and thereby put a brake to the wheels of industry? Let the Government think about this strange phenomenon and suggest an effective solution to this incongruity.

It is with an idea that an effective solution to the various problems arising out of the abolition of the managing agency system will be found that the author has attempted to highlight here some of those problems.

Criminal Conspiracy : its Conception and Proof.

By
Prafulla Kumar Sarkar, (Third Year LL.B.
Class)

The term 'Conspiracy' has its origin in Latin 'Conspirare' in which etymologically 'Con' means together and 'spirare' means to breathe. The above meaning leads readily to the inference that an act of conspiracy involves more than one person of the 'same breathing' which law defines as common intention, common design or common concert.

The conception of this particular type of crime remained vague for a long time. In England it took a few centuries to reach a precise definition. At a time in England when Police system was ineffective the law felt itself dangerously threatened by any concert amongst evil doers and as such in the seventeenth and the eighteenth centuries indictments against conspirators were held good very readily. Even Holt C. J. remarked 'A conspiracy is odious in the law'. Such vagueness was dangerous for equitable dispensation of Justice inasmuch as any combination to effect any purpose which might have been viewed by judges as distasteful was considered as punishable. The resultant elasticity in the definition of the crime and the unusually wide range of evidence by which the punishment for it was supported posed a danger. The following observation of Fitzgerald, J. in course of the Irish State Trial in 1867 should be borne in

mind by the judiciary in any country while holding conspiracy trials. The observation runs thus : "The law of conspiracy is a branch of our jurisprudence to be narrowly watched, to be jealously regarded and never to be pressed beyond its true limits". Similar are the prudent words of greatest of American Judges, P. Marshall C. J. in "Exparte Bollman." "It is more safe that punishment should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they are to operate, than that it should be inflicted under the influence of those passions which a trial fails to excite and which a flexible definition of the crime, or a construction that would render it flexible, might bring into operation".

Introduction of two sections 120A and 120B dealing with Criminal Conspiracy in chapter VA of the Indian Penal Code was made quite recently by the Indian Criminal Law Amendment Act of 1913. It is not, however, the fact that prior to 1913 there was no law relating to conspiracy punishable under the I.P.C. or that conspiracy was not viewed as an offence. Sections 107 to 120 in Chapter V and Section 121A in chapter VI added to the I.P.C. by the Indian Penal Code Amendment Act of 1870 dealt with the

offences relating to conspiracy. Besides, Section 34 also relates to conspiracy involving acts on a common intention. But there is a fundamental difference between Section 120A and Sections 34 and 107. For an offence under Section 120A, a mere agreement to commit an offence is enough even though no illegal act follows, while in Section 34 there must be some commission of an offence in furtherance of a common intention of all the offenders. Similarly for an offence under Section 107 an act or illegal omission must take place in pursuance of the conspiracy (*Pramatha Nath Vs. Saroj Ranjan*, 1962 A.I.R. S.C. 876). From the statement of objects and reasons for introduction of the above two sections in 1913 in our Penal Code it would be evident that the law relating to conspiracy was directly adopted from the English Statute with a fundamental difference as regards its proof. It was observed that Section 121A of the I.P.C. which mainly related to conspiracy to wage or attempting to wage war against the Government of India, and other existing laws was inadequate to deal with modern conditions under which 'dangerous conspiracies' are entered into in India with more expansive aims and objects than those contemplated in the existing laws. It was also held that the new law was "designed to assimilate into the provisions of the Indian Penal Code those of the English Law with the additional safeguard that in the case of a conspiracy other than a conspiracy to commit an offence some overt act is necessary to bring the conspiracy within the purview of the criminal law." Criminal conspiracy was made a substantive offence. It may be noted here that the offence contemplated in the new section is implied in the offence of abetment as defined in Section 107, but this further addition is justified by the Legislature on the ground that cases occur which could not be punished as offences of abetment requiring closer connection between the offender and the offence.

It is, therefore, necessary to start with the concept of conspiracy as given in English Law.

The present conception of conspiracy in English Law is the product of a long evolution. Stephen in his *History of Criminal Law* states how the English Law on conspiracy evolved. The first form in which this crime appeared in the Common Law was an agreement of persons who combined to carry on legal proceedings in a vexatious or improper manner. It was mostly treated as a civil wrong. The criminal side of it was emphasized by the Star Chamber and moulded it into a substantive offence of wide scope and gradually its principles were adopted by Common Law Courts which later on developed it as the law of principals and accessories. It was subsequently treated as a form of attempt to commit a wrong. Conspiracy in English Law as it stands now, is an indictable misdemeanor, consisting in an agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means. In Section 120A of the Indian Penal Code the above provisions of English Law have been adopted in the following manner: the offence of Criminal conspiracy occurs when two or more persons agree to do, or cause to be done an illegal act or an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy with the proviso that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof. The section also contains an explanation to the effect that it is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

The main difference which exists between the two laws is that the first three elements, namely an agreement between two or more persons, to do an illegal act and to do a legal act by illegal means are present in both the laws. Overt act is also necessary in both cases. In Indian Law such overt act is necessary only in cases of a conspiracy other than to commit an offence in

furtherance or in pursuance of that conspiracy, while in English Law the mutual consultation and agreement are considered as a sufficient overt act [vide *Mulachy Vs. RLR—3 HL305 (328)*].

The law relating to conspiracy in the United States of America is the same as that in India. In American Law, the crime is completed when an overt act to effect the object of the conspiracy is done by at least one of the conspirators. An overt act is something apart from the conspiracy and is an act to effect the object of the conspiracy. It need be neither a criminal act nor the very crime that is the object of the conspiracy. It must, however, accompany or follow agreement and must be done in furtherance of the object of it.

The term 'agreement' needs proper interpretation. Conspiracy is not all a mental crime with concurrence of the intention of parties. Bare intention is no crime in law anywhere. Lord Chelmsford puts it clearly thus, "agreement is an act in advancement of the intention which each person has conceived in his mind" (*Mulachy Vs. the Queen*). Agreement is thus not mere intention but the announcement and acceptance of intention.

There may be a conspiracy to do an illegal act which does not amount to an offence as defined in Section 40 of the I.P.C. In such a case some overt act is necessary to bring it within the offence of conspiracy. In English Law when some civil rights of another are infringed no case of conspiracy lies. Thus an indictment will not lie for a conspiracy to commit a mere civil trespass or for a conspiracy to deprive a man, an offence under an illegal trading company. (*R. Vs. Muller, Mogul Steamship Co. Vs. McGregor & Co.*). It may however be noted that in Indian Law there has been no experiment of a prosecution of a conspiracy charge the object of which is an illegal

act not amounting to an offence.

This review would therefore be limited to cases of conspiracy connected with the commission of any offence in pursuance of the conspiracy. The punishment of co-conspirator would be determined by the offence which is the object of the conspiracy. Section 120B lays down that the punishment would be the same as of abetment of the offence as under Section 107 and the following sections of the I.P.C., where however the offence, which is the object of conspiracy is punishable with the imprisonment for less than two years, the punishment of conspiracy to commit that offence cannot exceed six months.

From the definitions given above it may be seen that a conspiracy is mere agreement between two or more persons to break the law and it is immaterial if any other thing is done in pursuance of the conspiracy. There can be no conspiracy with one's ownself or with his wife as in English Law husband and wife are reckoned as one person as per the old doctrine of conjugal unity. In *Rex Vs. Gill* the point was illustrated thus: if two lovers agree to commit suicide together but promptly think better of it, they nevertheless are liable to an indictment for conspiracy.

From practical point of view it is often difficult to trace and prove the agreeing mentality in the case where nothing else has been done beyond the agreement. Therefore, the conspiracy prosecutions have been generally directed to cases where the conspiracy has gone further in act or conduct to work out the conspiracy. It is easy to infer the conspiracy (the agreeing mentality) from such act or conduct of the members of the conspiracy, from what they do it is easy to find what they minded to do. But the Judiciary in England sternly discourages such a course as unfair to the accused (*Rex Vs. Luberg*). The agreement, in English Courts, would require to be proved from circumstantial evidence other than from the overt acts pursuing the conspiracy.

How the offence of conspiracy is confined exclusively to the mentality of the accused party is illustrated in a case reported in 42 Cr. L.J. III (Bom) where the conspirators performed some witch-craft to kill a person. Although what the accused party did was foolish and had nothing to do with murder, that clearly proved their agreeing mentality to murder and therefore, it was a case of conspiracy to murder. There has been a long line of judicial decisions in conspiracy cases in India from which the conception of this particular branch of crime has been more and more clarified. The notable cases are Dacca conspiracy case against Pulin Das and others (13 Cr. L.J. 609, pp. 667) and Amritalal Hazra's case 16 Cr. L.J. 427 pp. 508 where it was held that "the gist of the offence of conspiracy is the bare engagement and association to break the law." And Danas Case—1968 Cr. L.J. 260 (S.C.). In this recent case the Supreme Court held: "The offence of conspiracy to commit a crime is different from the crime that is the object of the conspiracy, because the conspiracy precedes the commission of the crime and is completed before the crime is attempted."

The Proof of a Conspiracy

In English Law the principles are just the same for proving a conspiracy as for other crimes. It seems as if there were unusual laxity in adducing such proofs because of two peculiarities, firstly a conspiracy cannot be proved by direct evidence as agreements are swiftly and secretly entered. It can be proved by a mere reference from the subsequent conduct of the parties in committing some overt act. There may be several isolated doings, a conjectural interpretation is put to reach an aggregate of these interpretations and a legal inference is drawn. Circumstantial evidence is the main prop to embrace the range of acts committed at widely different times and in widely different places. (Rex Vs. Hammond & Webb). Consequently

the range of admissible evidence is further widened and between the leader and the co-conspirators the doctrine as to the principal and the agents is applied so that any act done by any of them will be admissible against the other. This is of course not peculiar to trails of a conspiracy case, it applies to all cases of plurality of offenders. In conspiracy cases it only assumes unusual prominence because of the special nature of the crime involving long intervals of time, long series of acts and a vastly wide area of incidents between a common criminal design is formed and the time where it is carried out or is frustrated by arrest. The recent Bank dacoities in Calcutta will offer a good example. If these crimes are the acts of a particular group, they involve the conspiracy part and the overt acts done in pursuance of that conspiracy, the proofs are to be collected on the basis of the above principles and those following subsequently for a successful prosecution in trial courts and investigation is to be directed to that track in the event of arrest of a number of co-conspirators.

In trials of famous conspiracy cases in India the above principles have been adopted. In Barin Ghosh's case—(11 Cr. L.J. 453) it was held: "That to establish the charge of conspiracy there must be agreement, there need not be proof of direct meeting or combination, nor need the party be brought in each other's presence, the agreement may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design." The similar view was also held in Pulin Das's case—(13 Cr. L.J. 609) and Pakur Murder Case against Benoyendra Pandey—(37 Cr. L.J. 394 (Cal.)). It was very succinctly held by the Supreme Court in another case reported in 1967 Cr. L.J. "Conspiracy was the root and specified instances were the fruits". Recently in the Kanoria Murder Case, reported in Cr. L.J. 1965 (2) 713, the same principles were re-iterated. Another very significant point is that conspiracy

is a continuous offence and a single conspiracy may go on for several years. The Drug conspiracy case against Abdul Rahman and others is a notable illustration. In this case the conspiracy continued from 1920 to 1932 in course of which several offences relating to the opium Act, the Dangerous Drugs Act and the Arms Act were committed by a long train of co-conspirators. It was held in that case—[36 Cr. L.J. 982 (Cal.)] : “It seems to me that it is only reasonable to hold that criminal conspiracy may come into existence, and may persist and will persist as long as the persons constituting the conspiracy remain in agreement, and so long as they are acting in accord, in furtherance of the object for which they entered into the agreement. No doubt in the course of the years some of the original conspirators fell and others came in. Some of the persons who entered in the agreement, might get tired of taking part in it, and some might have waxed fat on the illicit profits and thought it well to retire, others may have died and various links in the chain I have described might have been forged by other persons coming in and taking places of the others who fell out of the large links, as I have called this, the chain may have become more extensive, or some of them may have shrunk, but in effect the conspiracy went on beginning in 1920 and lasting upto the year 1932”. In view of this continuous nature of a conspiracy the language of the charge under Section 120B should not be in the form :

.....“On or about the day you agreed to do or cause to be done etc. etc.,” as has been given in Ratanlal’s Book on Law of crimes at page 271. Such language would rather constitute a defect in the charge. The language in a model charge of conspiracy should be : “on or about the day.....you were

a party to a criminal conspiracy to do or cause to be done etc., etc.,” in view of the fact that the particular co-conspirator or co-conspirators might not have existed at the time when the agreement was made but entered subsequently.

The penal Section 120B where the language used is “whoever is a party to a criminal conspiracy to commit an offence” contemplates this distinction. It differs from the definition Section 120A where the language used is “when two or more persons agree to do or cause to be done etc., etc.” There has been a departure here from the usual practice of the Legislature to keep the language of the definition section and that of the penal section identical. This difference here is significant emphasising on the continuous nature of the offence of a criminal conspiracy. It may further be mentioned that if any or more of the objects of conspiracy fails at the end, the accused may still be convicted with the remaining object or objects. It is not necessary that the conspiracy should be proved with all its objects as charged or otherwise the whole case would fail. In Abdul Rahaman’s case one of the objects of the conspiracy regarding the charge under the Arms Act was not proved, but the accused was convicted for the other objects, regarding the offences under the opium Act and the dangerous Drugs Act.

Conspiracy and offences done in pursuance of the conspiracy are all considered to be in the course of same transaction. Thus a number of specific offences committed in pursuance of the conspiracy exceeding more than one and lasting over a period more than 12 months can be tried in the same trial as being done in course of the same transaction as provided in Section 239 of the Criminal Procedure Code.

The principle of joinder of charges was followed in the Calcutta Electricity Theft Conspiracy case (38 Cr. L.J. 545 Cal.) where the charge of conspiracy framed entirely failed at the end. The specific charges against individual accused persons were held as legal joinder in the same trial. It was held: "Where there is a conspiracy having one or more objects in view and certain offences are committed in pursuance of the conspiracy, the several offences generally form part of the same transaction". The principle was accepted and continued in the judgment of the Privy Council of the same case reported in 39 Cr. L.J. 453 (P.C.). The principle established in this regard is that "the legality of a joint trial depends on the accusation and not on the result of the trial."

Local Jurisdiction of conspiracy cases :

In *P. Dalmia's* case reported in 1961 (S.C.) 1589 the Supreme Court held that a court having jurisdiction to try conspiracy case has also the jurisdiction to try all the specific offences in pursuance of the conspiracy even though those offences might have been committed outside the local jurisdiction of such court. This decision overrules the earlier Full Bench decision of the Calcutta High Court holding a contrary view in *Jiban Banerjee's* case.

It has also been held in another Supreme Court case reported in 1961 (2) Cr. L.J. 736 (S.C.) An interesting question in respect of a conspiracy charge often arises whether a single person can be convicted for the offence of conspiracy when two or more persons are required to commit the offence of a conspiracy. It has been held in a Supreme Court case that a single person can be sent up and convicted for the offence of conspiracy. The Supreme Court decision reported in 1956 Cr. L.J. 831 is as follows :—

"It is not essential that more than one person should be convicted of the offence of

conspiracy. It is enough that if the court is in a position to find that there were two or more persons who were actually concerned in the criminal conspiracy". But where more than one person is charged with conspiracy and one but all are acquitted, the remaining one cannot be convicted on the charge of conspiracy.

Section 10 of the Evidence Act and proof of conspiracy :

Section 10 of the Evidence Act is particularly applicable in conspiracy cases. It is an exception to the hearsay rule and under the section anything said, done or written by any person (neither a witness nor an accused) would be evidence against all other conspirators. There is one fundamental difference between the English and the Indian Law. The principles of Section 10 of the Indian Evidence Act as a proof of conspiracy were adopted from the English Law with this variation that in English Law anything said, done or written by a co-conspirator in order to be a proof must be "in furtherance of" the conspiracy, while in Indian Law those must be in reference to their "common intention". The interpretation given on this difference by the Supreme Court is very elucidating. "The expression,—“in reference to their common intention” is very comprehensive and is designedly used to give a wider scope than the words “in furtherance of the conspiracy” in English Law with the result that anything said, done or written by a co-conspirator, after the conspiracy was formed will be evidence against all others—1965 (1) Cr. L.J. 608 (S.C.). The term conspiracy as used in Sec. 10 of the Indian Evidence Act should be taken in its dictionary meaning in as much as the Indian Evidence Act was enacted in 1872 and conspiracy was defined in Sec. 120A which was introduced in the Indian Penal Code only in 1913. The cardinal point however in application of the provisions of Sec. 10 is that the statement must come from a conspirator who must be reasonably believed to be so and the “reasonable belief” does not

amount to proof. The provision is applicable if the co-conspirator communicates anything in reference to the conspiracy to another and if the latter records it in writing or even what heard from the former conspirator this writing would be admissible together with the statement of the former conspirator. This principle was laid down in the Chittagong Armoury Raid case against Surya Sen where in a diary of a conspirator there was a name referring to the activity of certain conspiracy, as heard from yet another conspirator the statement was held admissible in evidence (35 Cr. L.J. 334-F.B.).

The evidence under Section 10 of the Evidence Act is based on the principle of agency. Thus the statement of the conspirator who may be neither an accused nor an witness is admissible. Any confession of any of the conspirators, an uncorroborated evidence of an accomplice witness and any such other direct evidence irresistibly lead to an inference that the particular person was a party to an agreement which would be sufficient to admit his evidence by way of anything said, done or written by him according to this section. Several judicial decisions viz. in Amritlal Hazara's case reported in 16 Cr. L.J. 497 at 505 and Provincial conspiracy case (38 Cr. L.J. 818 at 820, 1956 Cr. L.J. 831 (S.C.) have emphasized that in order to give a clear notice of the persons whose statements and writings may be used in Section 10 of the Evidence Act, it is highly desirable that the names of the known conspirators should be mentioned in the charge. In this regard it should be noted that anything done after the conspiracy has ceased or ended is not admissible. A narration to a third party after the conspiracy has ended or a confession after arrest would not be evidence (1966 Cr. L.J. 1220. (Patna) following 41 Cr. P.C. 871 (P.C.)). But the statement or writing made by a conspirator after his arrest when he was still in conspiracy mind with reference to the common intention would be evidence under Section 10 of

the Act. A letter written by an accused after his arrest from the jail giving some instruction to another co-conspirator would be evidence under Section 10 of the Act (Abdul Aziz—33 Cr. L.J. 456-Cal.). The evidence under Section 10 of the Act cannot, however, be used in favour of the accused. It can only be used against him. [1965 (1) Cr. L.J. 608 at page 614]. There are important judicial decisions on application of Section 10 of the Indian Evidence Act in respect of Secret Code, Ciphers, intercepted letters, telegrams and typed letters. It is a common knowledge that conspirators in their communications to one another often make use of secret codes and cyphers just to evade detection. The principles how these are used as proofs against the conspirators have been laid down by the following important judicial pronouncements: "The existence of a secret code in the possession of a person charged with conspiracy which sets forth the names and addresses of other persons charged with such conspiracy and contains words and names having revolutionary significance is itself good evidence for supposing that the persons named therein have conspired to commit an offence". [30 Cr. L.J. 646 (Patna full Bench)].

As regards ciphers, it was held: "Ciphers are themselves materials affording good reason for inferring that the name and address and other matters appearing in the cipher were connected with the furtherance of the object of the conspiracy as evidence under Section 10 of the Act. [38 Cr. L.J. 818 at page 833-Cal.].

Intercepted letters: Intercepted letters from the post office are admissible in evidence under Section 10 of the Act. In the case where copies were taken and the original letter allowed to be delivered, the copy would be admissible as secondary evidence after a notice of production of the original is given to the party—[38 Cr. L.J. 818 at page 832].

Telegrams: Section 10 of the Evidence Act

does not cease to apply to anything said, done or written by a conspirator simply because that conspirator gives evidence as an approver... D was being tried along with others under the Explosive Substances Act. His conviction rested upon the evidence of the approver J corroborated by the telegram. One was sent by J to D and this evoked a reply by telegram alleged to have come from D. The originals of the telegram were produced by the check office, Calcutta. D denied to have received or sent any telegram. It was held that there was sufficient evidence which beyond any reasonable doubt connected D with the conspiracy—[45 Cr. L.J. 471 (Sind. Full Bench)].

Typed letters : In a former case, *Manabendra Nath Roy Vs. Emperor* (1933 All 498, 148 I.C. 853 and 35 Cr. L.J. 768) the peculiarities of a type-written letter corresponding with the peculiarities of the type-writing machine resulting from the defect in the latter were brought into evidence through Section 45 of the Evidence Act although the section makes no reference to type-writers. But in the Meerut conspiracy case, the above decision was overruled. Sulaiman C.J. observed in *S. H. Jhabwala Vs. Emperor*, (A.R. 1933 All. 690) "until the Legislature amends Section 45 of the Evidence Act, which as it stands now, the expert opinion on type writers is excluded, the court may ask the witness to explain points in favour of the view whether the two documents have or have not been type-written on the same machine but must come to its own conclusion and not treat such assistance as expert opinion, a relevant fact in itself. In a recent case (*Hanumant Singh Vs. the State of Madhya Pradesh*, 1933 MWN, 107) the Supreme Court also held that opinions of expert to prove that a particular letter had been typed on a particular type-writer are not admissible under the Evidence Act as they do not fall within the ambit of Section 45 of the Act.

Sanction for prosecution under conspiracy charge :

In non-cognisable cases or in cognisable offences not punishable with death, transportation for life or rigorous imprisonment for a term of two years or upwards, consent of the Chief Presidency Magistrate or the District Magistrate empowered in this behalf by the Government or of the State Government itself is required under Section 196A of the Criminal Procedure Code to initiate proceedings under Section 120 B of the I.P.C. and to which provisions of Section 195(A) is applicable. The object of law in requiring sanction in cases of conspiracy under the above section is designed to safeguard persons from frivolous accusations of Criminal conspiracy. In this regard Newman, J in *Venkataramiah's case* observed: "Now there is an obvious danger that charges of criminal conspiracy might be lightly made, savouring of persecution rather than of prosecution. And it was with a view to safeguarding citizens against such prosecution on frivolous charge of criminal Conspiracy that Section 196A Cr. P. C. was enacted at the same time as Section 120B I.P.C. insisting upon the previous approval of Government or of some senior and specially empowered Magistrate before such proceeding can be even initiated. If this safeguard is ignored by Magistrates they should be suitably admonished. But when a case has been initiated and has ended in conviction, it is obvious that there never was any innocent person to be protected from prosecution". Incidentally it may be noted here that Section 196A was added to the Cr. P.C. by Act 18 of 1923, just ten years after the introduction of Sections 120A and 120B in the Indian Penal Code. The importance of addition of this section providing for prior consent to the initiation of the proceedings under the conspiracy charges cannot be over-estimated, as a matter of fact it involves full application of the judicial mind of the sanction-giving authority over the entire facts and circumstances of the case prior to its being launched for a full-fledged trial in a competent court of law.

Powers and Obligations of the President of India

By

C. Raghavan, Second Year L.L.B. Class.

One often hears : "the President of India is just a ceremonial figure-head who is required to function as an unquestioning rubber-stamp of the ruling party". But how absurd it is can be seen if one studies the Indian Constitution in its proper perspective and appreciates the powers and obligations of the President.

The remark quoted above was true upto a point, until recently—till the death of the late President, Zakir Hussain, to be precise. In normal circumstances, when the Government of the day is discharging its functions efficiently and in accordance with the Constitution, naturally the President of India is expected to play only a passive role, acting generally on the aid and advice tendered by his Council of Ministers ; and this was so for 15 years since independence. The single party dominance at the Centre as well as in the states and unquestioned personality of the late Prime Minister Mr. Jawaharlal Nehru made the President a symbolic head of State ; the cabinet dominated the scene and the President remained just a constitutional figure-head.

Under the Constitution the President is to make certain appointments like the Judges of the Supreme Court and High Courts, Election Commission and Union Public Service Commission, the reason being that these officers should

function independently of the Union Cabinet. Besides, the President has certain constitutional functions to perform with regard to the Units, such as appointment of Governors, assenting to certain bills passed by State Legislatures, application of emergency provisions. When the Parliament is not in session the President is empowered to promulgate Ordinances. In many of the Articles dealing with these provisions one finds the words 'when the President is satisfied'. But the practice was that on these matters decisions were taken by the Cabinet and the President's signature completed the formality.

But certainly this is not the position assigned to the President by the Indian Constitution. With the fast changing composition of the Parliament and the State Legislatures and in the context of growing political uncertainties, the President is expected to play an active role. By the Oath he takes under Art. 60 and impeachment for violation of the Constitution by him, he is bound to assume active role in defending, protecting and preserving the Constitution when occasions demand it.

Ours is a growing democracy. Our Constitution is elaborate and exhaustive. Yet, it is still open to conflicting interpretations. Though we looked to British conventions, whenever

doubts arose, it was not the intention of the Constitution-makers that our President would be bound down by British conventions. The conventions on the role of British Crown have developed in the context of political developments there. We cannot always follow such conventions since the conditions here are different. The debates in the Constituent Assembly and the various provisions in the Constitution relating to the manner of election, term of office, Oath and impeachment of the President, lend support to this view.

In India, we have a democratic form of Government with a President elected for a specific term. But the British monarchy is regulated by the Law of Succession. In Britain 'the King can do no wrong'. The argument that the Indian President is always to act on the 'aid advice' of his Council of Ministers is in conflict with the principle of impeachment for failure to defend and protect the Constitution. Under the Constitution when the President is to give his assent or to pass an order on being satisfied, his 'satisfaction' there means that he has the right to use his discretion by judging the particular situation before arriving at a conclusion to do or not to do a particular thing. If the President is bound by the 'aid and advice' of his Council of Ministers and cannot act otherwise, there can be no question of his satisfying himself about the propriety of a decision and equally there can be no impeachment of the President for an action for which he is not even remotely responsible. One does not find any specific provision in the Constitution that the President shall always act on the advice tendered by his Council of Ministers. This deliberate omission in the Constitution was explained by Mr. B. N. Rau, a member of the Constituent Assembly as, 'in view of his constitutional obligation to protect, preserve and defend the Constitution, the President was not always bound by the advice of his Council of Ministers, especially when, in his view, Ministers were seeking to violate the Constitution.' Dr. Ambedkar, while

explaining the various provisions in the Constitution, held the view that the President should be 'generally bound by the advice of his Council of Ministers' but this did not completely deny him the right to use his discretion in certain situations. However, this discretion is not personal or arbitrary but discretion used objectively and conscientiously.

Now, on the much-debated question 'whether the President is bound to accept the advice of the Prime Minister on the dissolution of Parliament', opinion is sharply divided. Some hold the view that the President has to give reasonable time to a Prime Minister who has lost the majority support in Parliament at any point of time, to consolidate his or her position. The other view is that the President is under no duty to help the Prime Minister by delaying the due action or otherwise, even within the constitutional limits so that the Prime Minister could consolidate his or her position in the Parliament. Nor the President is obliged to dissolve the Parliament on the advice of the Prime Minister in all circumstances.

If a politically distressed Prime Minister, after having lost the majority support in the Parliament, advises the President to dissolve the Parliament, the President, at his discretion, can ignore such advice and give a chance to the Opposition or any other group to form a Government. In this, the President is guided by the principle of welfare of the country above personal, party or other parochial interests. This is not the privilege of the Prime Minister to be used as a weapon either to discipline the treasury benches or to threaten the Opposition; rather, it is the privilege of the President to grant such a dissolution or not. But this prerogative of the President is expected to be exercised following the British Conventions in the absence of any specific provision in the Constitution since the basic tenet of our Constitution is Parliamentary democracy as prevailing in England and not the Presidential form of Government as in the United States of America.

The President of India

By

Nitya Ranjan Das, First Year L.L.B. Class.

INDIA has been declared in 1950 as a Republic with the President as its head. The fathers of our constitution, intended India to adopt the path of Parliamentary democracy, but gave it a Presidential form. This has raised serious controversy as to the powers and position of the President and Prime Minister.

Some people say that in a Parliamentary set up President is a mere constitutional head of the state and has no real executive functions. They say that the Indian President occupies the same position as is held by the crown under the British Constitution. But in their enthusiasm for the Prime-Minister, they perhaps either forget or wilfully by-pass the main-point that there is fundamental difference between India and England relating to socio-political conditions. They want to forget that history of constitutional developments is not same in the two countries concerned. In England, the present constitution is the product of a prolonged bitter and bloody struggle between the king and the Parliament for political supremacy. With the progress in the battle the constitution has developed and reached the present form. And ultimately the king admitted complete defeat and placed the monarchy at the mercy of the Parliament. But the Parliament did not destroy the kingship—but retained it and attributed some elements of

magnificence and decoration without any real significance. This has been done as a mark of respect to the sentiments of the British people and the glorious tradition of the monarchy.

But in India no such thing exists. Here the makers of the constitution were freemen and possessors of supreme power. They were under no moral or legal obligation to any person. Therefore, if it was their intention that the President shall be magnificent chief then why did not put it in the documents in clear and specific terms? But instead they left the issue to a serious controversy. This point deserves serious consideration.

It has become a fashion to say that Indian constitution has been modelled upon its British counterpart. This is only a partial truth. In England, Parliament is supreme. In India, constitution is supreme and this supremacy of the constitution to some extent passes to the Supreme Court preeminence as the ultimate and final interpreter. In England, the judiciary has not been given any such right. There the Parliament is supreme both in matters of legislation and justice. But in India, the Parliament has to function within the framework of the Constitution (notwithstanding the power of the parliament to amend the constitution follow-

ing a special procedure). Why is this sharp contrast in distributing State-powers? This is because, as I stated earlier, due to different political conditions of the two countries. In England, Parliamentary system has a root in the people have accepted it, and the party system has developed in such a way so as to further the cause of parliamentary democracy. But such is not the case with India. Here people in general are not much interested in political affairs. They have grown a habit of apathy, and instead of two or three parties, dozen of parties with conflicting ideologies are functioning. All these cannot contribute much to a healthy growth of Parliamentary democracy and this possibly did not escape the foresight of the members of the Constituent Assembly. It is true that they wanted India to adopt the path of Parliamentary democracy. But for its protection and development, the Constituent Assembly devised some measures which are completely absent in British constitution. In England, the parliament assumed to itself all powers taking it away from the king. They were not prepared to give a share of it to any other state-organ—such as judiciary because they were afraid of the possibility of judicial intervention under monarchical influence in the discharge of their duties. But on the contrary, the Indian Constituent Assembly were aware of peculiarities of Indian situation. They, therefore, made the Constitution as the source of all powers and gave the judiciary the power of interpreting the constitution. The purpose was to ensure the preservation of democratic institution, to protect it from being subverted by the parties not committed to democracy, and to compel all parties who might come to power to function within the frame-work of the constitution.

Keeping this in mind the authors of our constitution gave some discretionary powers to the President which he should exercise not for becoming an autocrat but for the preservation of the parliamentary system. Several Articles can

be quoted in support of this view. If one compares Article 53 with Art. 74(1) then it would appear as Prof. D. N. Banerjee observed that the President is not bound under Art. 74(1) to accept the advice of his Council of Ministers in all circumstances. From a reading and critical examination of the Constitution it cannot be inferred that the presidency is a post office of the Prime-Minister. This interpretation is said to be implied in support of which no material evidence can be produced. The constitution desires the President to act in the best interest of the country. He is not under constitutional obligation to oblige a Prime-Minister, if he or she does not enjoy majority support in the house or if acceptance of his or her advice may prove disastrous for democracy, if it leads the country to chaos, and disorder and a consequent breakdown of the constitution".

He cannot and should not remain a passive and helpless spectator over the destruction of constitutional machinery. But all these he should do not for any personal interest but for the furtherance of democracy and parliamentary system.

I like to conclude here with a short reference to the recently held symposium organised by the Bar Association of India in Delhi on 12th April 1970. There all the participants Mr. M. C. Seetlvalad, Mr. M. C. Chagla, Mr. Morarji Desai and Mr. Saraju Prosad agreed that the President is not a mere constitutional head, but he commands some executive powers which he can exercise at his own will, even contrary to the advice of the Prime-Minister, if the greater interests of the country so deserve. There are forces of disintegration and disorder already visible everywhere. There is corruption, nepotism, favouritism and inefficiency in many parts of India to-day. These may lead to small disorders and gradually to misgovernment and grave general disorder and it is necessary to guard ourselves against general disorder of this

Future space Law : A possibility

By

Malay Kumar Ghosh, First Year LL.B. Class

"Law was neither a trade nor a solemn jugglery but a living science in the proper sense of the word"—(Sir Ashutosh Mukherjee). Really law, the living science, has been keeping pace with the dynamic age. Just to prove its life the necessity of space law, as part of international laws, is felt right from this moment specially after the successful operation of Apollo 12 and unsuccessful Appollo 13.

The far-sighted international lawyers, perception from 1907 for the necessity of formulating laws regarding problems arising out of man's space conquest has now come true.

Though some jurists had been taking interest in this branch of law but it really had alerted lawyers by the operation of Sputnik I on 4th October 1957. From then various searches in this new sphere has only enhanced the scope and necessity of law, the living science, to cope with the technological science.

After a good deal of attempts in 1962 U.N.O. had set up a legal sub-committee trailing the committee on the peaceful uses of Outer Space to deal with the legal problems as consequence of the space exploration. The sub-committee has passed several resolutions and recommended for two international agreements which

have been accepted by the U.S.A. and the U.S.S.R. including many other States. The work on the third agreement is remarkable.

As regards the nature of the legal problems, the first question of intrusion is of serious nature. A state has its complete sovereignty and jurisdiction over its land, water and air space. Any kind of illegal intrusion is usually dealt with severity. If any space craft from any state of inimical nature or simply by fault (the scope of such fault is not impossible) traverses other States' air space is the affected State entitled to shoot it down or can compel for force-landing? The State have agreed in the matter that outer space is free for the use of peaceful purposes and the State above whose territory a satellite passes is not entitled to take any action against it. But the problem is not so easy as it looks. Because, if any satellite equipped with highly developed instruments is launched for espionage purpose and passes over State(s) completing its mission whether it will or would be possible practically for the victimised State(s) to be silent spectator(s) of the incident merely for the lack of proper international understanding, convention or law expecting super developed dictating systems in possession for such intrusion or espionage etc.? Besides, is there any guarantee that the satellite or space craft will

never cross the air space of any State or States especially when the boundary line of air and outer space is controversial and yet to solve it in the changed circumstances of satellite or space craft reality. Any kind of such menace or its possibility will or would soon raise the question of internationally reviewing the limit of air space with that of outer one. It is worthwhile to mention here that G. powers U2 (USA) spy plane was brought down by U.S.S.R. from the height of sixty two thousand feet. Called as air space. Already a good number of satellites are orbiting in the sky. The exact missions of these satellites are generally of dubious nature. So this demand from the State(s) can be expected or there is every possibility of it that the limit of air space over States' territory may or might be (Practically infinite.) within the reach of fixed powered telescopic range, a substitute for present st. height calculation (Internationally agreed) or within the limited range of electronic tele-system and subject to reconciliation from time to time by U.N.O.

Another problem of nuclear weapons carrying with the help of satellite should come within the purview of space law a main branch of international law because of its seriousness in character to prevent world or our solar family from unthinkable calamity of deorbitation and other far flung havocs.

Furthermore, there ought to be such provision in the space law regarding the technical side which is capable of making clear distinction between a satellite meant for our planet particularly and a space craft meant for celestial bodies right from moon. The particular and perfect legal division will help the future to solve many unwanted problems in space law.

The problem of satellite or space craft emergency landing and crashing, the question of rescue, damage caused by such accident, return of objects and question of compensation have also been agreed upon in this form that the

concurring State or States should deal these matters as international duty and every possible help should be extended to the satellite or space craft and astronauts as envoys of mankind. No question of confiscation of the craft or any legal action against astronauts can or could be taken. Compensation for damage caused by the craft or any of its part to any country's property or on life should be covered by the owner(s) State or States of the craft. The incident in 1962 of American crafts landing in Cuba and the debris from a disintegrating Soviet space craft over Wisconsin in U.S.A. may be recollected in this connexion. The requisite agreement has been signed in December, 1967 but not by all the States of the World.

There has also been an agreement on problem of any country reaching in any celestial body. According to present international law, a country which occupies uninhabited or unoccupied territory can legally colonize it and exercise its sovereignty and jurisdiction over it. But the agreement of States in 1966 has indicated a remarkable State from colonisation in the moon or any other celestial body.

As regards harmful contamination from outer space and problem of harmful contamination caused by space environment these have partly been settled proposing negotiation among States if their activities are likely to cause harm.

An (INTELSAT) International Telecommunications satellite organisation has also been set up to settle problems of regulation and allotment of channels for the coming future. It must have its legal status as there are non-military and military communications satellites by different wings, otherwise which organisation will control military communications satellites? Britain has launched officially her first military communications satellite a few days ago being the pioneer of other such satellites yet to launch. What about other Satellites already launched by State(s) without any official proclamations for their own interests. The problem of war propa-

ganda and its preventive measures should be devised failing which a complicated situation will collapse INTELSAT system and pollute the agreement of peaceful uses of outer space which should include immediately the earth orbit also.

The question of human offences in the space on the craft or while walking in the space or on any celestial body in future cannot be wiped out. In spite of development in technological science it is the same human habits and psychology which work both in and out of this planet with varied actions. The owner country's jurisdiction over the space craft and its passengers can be granted. But in case of any offence while walking or performing tasks in outer space, outside the space craft whether the country's jurisdiction can have any legal base or if the persons ask for political (space) asylum of another country what will or would be the general principle. The same law practised on earth or there will or would be any international

space committee which will decide on the eligibility for such asylum for anybody in space and will decide the dispute (offences or the question of asylum) obtaining the persons' views in which country he desires to take shelter? For these problems, the proposed International Space Committee (ISC) should have its own bases in the space as a section of UNO.

The resolutions already adopted or will be adopted in future through UNO Sub-Committee regarding space behaviours and general rules are yet nothing but 'Gentleman's agreement'. These simply may be called as conventions upto certain extent but not the law strictly called. The human civilisation has stepped into a new field which can make it possible the dream of one world and one parliament through the unstinted loyalty to UNO. Before that many hurdles will have to be crossed and then the resolutions and conventions can have a definite shape in the form of space law. It is time jurists all over the world seriously take up the job right now.

President vis-a-vis the Council of Ministers.

By

Debanjan Gangopadhyay, 3rd Year L.L.B. Class

In an address delivered on the occasion of the laying of the foundation stone of the Indian Law Institute in November, 1960, the then President Dr. Rajendra Prasad, in the course of his address expressed the view that there is no provision in our constitution laying clearly that the President is bound to act in accordance with the advice of the Council of Ministers.

This observation of the then President attracted the attention of the constitutional experts and they showed themselves sharply divided on the issue. Yet it became obvious that a majority of them were in favour of the view that the President should normally be a constitutional head of the state rather than one who could exercise real powers of the Government.

In the very recent past, the post of the President has earned considerable importance than ever before in the perspective of political developments and it is high time that we discuss the problem in all its aspects.

Our Constitution dealing with the relationship of the President with the Council of Ministers in articles 74, 75 and 78 provides:—

(1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions.

(2) No court of law has power to enquire as to whether any advice was given by the Ministers and if so, what it was.

(3) The Prime Minister shall be appointed by

the President and on the advice of the Prime Minister, the President shall appoint other Ministers.

(4) The Ministers shall hold office during the pleasure of the President.

(5) The Council of Ministers shall be collectively responsible to the House of the People.

(6) It shall be the duty of the Prime Minister:—

(a) to communicate to the President all decisions of the Council of Ministers ; (b) to furnish such information relating to the administration of the Union and proposals for legislation as the President calls for ; and (c) to submit for the consideration of the Council if the President so desires, any matter on which a decision has been taken by a Minister but which has not been considered by the Council.

These provisions only show that there must be a Council of Ministers with the Prime Minister at the head to aid and advise the President. But do these provisions establish any such claim that the President is bound to act according to the advice of the Council of Ministers? Ambedkar held the view that “the President of the Indian Union will be generally bound by the advice of his Ministers. He can do nothing contrary to their advice, nor can he do anything without their advice”.

Of particular importance to note here is that Dr. Ambedkar used the word “Generally” which

indicates that he could not generalise the contention that in all cases the President is bound to act according to the advice of the Council of Ministers.

The normal relation of things is that in our parliamentary system of Government, the Executive is responsible to the Legislature. As a result thereof, the Council of Ministers hold their offices not as a grace of the President (or literally during his pleasure) but because they have the confidence of Parliament. They go out of office not because the President has lost confidence in them but because they have lost the confidence of the Parliament. Obviously, there is no scope of conflict between the President and the Parliament, i.e., will of the electorate. If at all there happens any, the will of the electorate should prevail. This is the reason for which the constitution vests the Parliament with the power to impeach the President. Thus, so long as the Council of Ministers enjoys the confidence of Parliament, it is the President and not the Council of Ministers, who is made to play the role of adviser with no power to enforce and the real executive power lying with the Council of Ministers.

This view about the position of the President is shared by the Supreme Court of India in the following language:—

“In India, as in England, the executive has to act subject to the control of the Legislature; but in what way is this control exercised by the Legislature? Under Article 53 (1) of our constitution, the executive power of the Union is vested in the President but under Article 75 there is to be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet In the Indian constitution, therefore, we have the same system of Parlia-

mentary executive as in England, and the Council of Ministers consisting, as it does of the members of the Legislature is, like the British Cabinet, ‘a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part’. The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them.”

But apart from these simple affairs there may arise certain political happenings. When the Council of Ministers loses the confidence of Parliament and instead of resigning, advises the President to dissolve the House of the people, what should the President do? Is he bound by such advice? Or, in case of acute differences within the Council, should the President dismiss individual Ministers on the advice of the Prime Minister? Or, if a majority of the Council headed by one of the Ministers is opposed to the Prime Minister, should the President call for the resignation of the entire Ministry with a view to forming a new one? On the other hand, if it so happens that the ruling party expels the Prime Minister and a few other Ministers from the Party and selects a new leader, but the Prime Minister claims that he has the confidence of Parliament, what should the President do?

In such circumstances, if the President happens to be a man of political ambition, he may avail of these circumstances and lead the situation according to his sweet will on the plea of fulfilling the oath (Article 60) taken by him.

Thus Article 60 of the Constitution providing for the oath of the President is very important from the standpoint of constitutional validity of any act of the President in such circumstances. While taking this oath the President commits himself to the people of India to preserve, protect

and defend the constitution and the law of the land. Therefore, if the President considers that if he does not act in a particular way in such critical circumstances, the constitution itself and the established law of the land will be out of existence, say, by any political upheaval or Military take-over etc., he is fully competent by virtue of the responsibility vested in him by Article 60 of the Constitution to do whatever he may like to do in the name of the Constitution.

It appears, therefore, that as regards the

Council of Ministers, the Presidential powers may be said to have two limitations. In the first, he is normally bound to accept the advice of the Council of Ministers and in the second, in not accepting such advice he is liable to be impeached. But apart from these two limitations there may be created a vacuum wherein the President is his own master and is neither bound by the advice of the Council of Ministers nor runs the risk of a successful impeachment against him.

LAW AND SOCIAL CONTROL

By

J. Jambhunathan, First Year LL.B. Class

CAIRNS in his "Theory of Legal Science" characterises Social Control as including in its wide scope "every way through which human society exercises a modifying influence upon itself or part of itself." "Social mechanics" is Ihering's term for the "means" used by society for controlling individual purposes and moulding them nearer to social purposes. The development of this line of thought has led sociologists to postulate that the "means" include both Law and other free processes of Social Life.

The main criteria of differentiation between Law and other social processes according to one school of thought revolves round the view that Law is 'organised coercion' and other free processes form part of the non-coercive levers of reward and potentialities of association for the more efficient realisation of individual purposes. The other view postulated by anthropologists like MALINOWSKI holds that the clear differentiation of law from other means of social control has not always existed in its modern form. There is no clear demarcation and dividing line between legal and other rules originating from religion, folkways and custom. But most Anthropologists sharing the latter view generally agree that even primitive societies may have rules of POSITIVE Law in the Austinian sense which are distinguishable from the rest through specific enforcement by organised power, which renders rules "functionally" equivalent to "Law" of developed societies.

While surveying the growth and development of the classical Roman Law and the English

common law one cannot fail to notice the slow but steady injection into law of moral ideas such as those of equity, good faith, conscience, natural law and justice. This tendency to transform moral duties into legal ones, in however elliptical a form, is often regarded as an adjustment of the scope of one kind of social control to compensate for the inadequacies of others in a world of changing social emphasis. This tendency according to Ehrlich "brings about a continual shifting between the law of society and the law of the state."

In the economic sphere, for example, collective bargaining has been accepted in preference to the socially intolerable relationship of naked power between employer and the individual worker. This is but a striking example of the "socialisation of law" or the adaptation of Law to what Professor Pound refers to as "the paramount social Interest".

The industrial revolution exerted significant pressures and brought forth important changes in the very 'concept' of the role of 'police power' of the state to regulate and control the social life of its citizens. Public safety dictates a minute regulation of conditions of labour, of the structure of dwellings, of the construction, use and equipment of roads and vehicles; of the production, distribution and use of materials or instruments dangerous to human life. In the sphere of private law also the same pressure has produced significant changes. The test of negligence and its prerequisite of an existing duty have undergone change in modern conditions of mass

production. Cases like *M. C. Pherson Vs. Buick Motor Co.* (1916) 217 N. Y. 382 and *Donoghue Vs. Stevenson* (1932) A. C. 562 are manifestations of this overriding pressure. The ramifications of the doctrine of *Pylands Vs. Fletcher* (1868) L. R. 3 H.L. 330) and the grounds of the scope of civil remedies for breach of statutory duty over the whole field of human activities, manifest the pressures both of increasing industrialisation and of the claims to security against hazards thus created. It is manifestly clear that this social significance remains, whatever view be taken on the question as to whether the rule favours the interests of one economic class as against another. This is strikingly portrayed by the crypt observation of Lord Mac Millan in his *Law and other things* that "A crowded world cannot safely be left to its own devices."

To quote another example, the demands of the public health has exerted similar pressures in the legal field. This in turn has led to elaborate controls of the food that men eat, of the air they breathe, the external world that they see and the noises that they hear. Behind Lord ATKIN's discussion of the duty problem in *Donoghue Vs. Stevenson*, lies a whole social theory with all its attendant ramifications; these in turn vividly portray the problems which the social and economic environments press upon the law.

The same trend is also detectable in the gradual and steady extension of the employer's liability for negligence. In view of the increasing peril to life and limb in modern mechanised factories, there has developed through various statutory enactments, the important principle of giving compensation regardless of negligence.

In the sphere of general health as in the case of public safety, Law continues to march on manifested by regulatory and preventive legislations.

The most characteristic modern legislative trends and judicial and social conflicts naturally pertain to the economic institutions. The framework of earlier economic activity comprising of freedom of contract and free competition could no longer be the ideals. The emphasis in the modern "welfare State" is for a minimum of economic security for the individual human beings whose lives depend upon the economic structure. At the beginning of the twentieth century the courts were still pondering on the question as to what special features were there in the employer-employee relationship that can justify restraints on this liberty of contract. The course of legislation has, however, reflected the concrete and over-riding economic implications involved and the undesirable consequences of unfettered contracting powers and rights recognised and exaggerated by common Law rules. Numerous and increasing regulations are imposed by law upon the claim to freedom of contract, as well as the claims to use and dispose freely of property. The very inclusion of the proprietary right as one of the fundamental rights in our Constitution is being vigorously challenged and probably not without reason based on social needs and aspirations.

The "socialisation of law" is, therefore, the direct and inevitable result of social interest in the stability and progress of economic institutions as a whole; and also with the claim that certain minimum standards of individual life shall be actually achieved in the concrete economic situation, as distinct from being conceived in merely abstract way. Professor Pound sees in all these a tendency towards "a new feudal system" in which rights and obligations of the individual are determined by law on the basis of the economic structure. This analysis seems, however, to be founded almost exclusively upon the traditional concepts of common law. A better approach to the whole question would appear to lie in the direction of the awareness

of the increasing social pressures due to rapid and vast technological changes and the dominant pressure for a universal minimum standard condition for dignified life. If this minimum can be attained by the rapid "Socialisation of law", as some jurists think possible, then some of the most dangerous impending conflicts may still be avoided. It is in this context that Law has a leading role in the adjustment of the various conflicts with economic security, efficiency and progress. If the jurists fail in this most impor-

tant task of adapting the science of law to changing circumstances, the very social structure, it tries to protect is bound to collapse. Any attempt, according to Ehrlich, "to imprison the law of a time or of a people within the sections of a code is about as reasonable as to attempt to confine a stream within a pond. The water that is put in the pond is no longer a living stream but a stagnant pool and but little water can be put in the pond." Sooner, the legal world realises this, the better for the society.

A Reflection on Equal Pay

By

Dilip Kumar Mukherjee, B.A., LL.B., Advocate,
Cert. L/W. (G.W.B.)

The concept of "equal pay" has long been established and accepted by many developing European Economic Community Countries and U.S.A. Recently the Government of United Kingdom has embraced this principle and has passed an "Equal Pay Bill (No. 2), which will become effective after the 30th December, '75.

Among the European Economic Community Countries, France, Germany, Netherlands, Italy, Belgium, Luxembourg have in fact, adopted the principle of "equal pay", yet according to a recent report of the EEC commission, the implementation of equal pay has not been completed.

France : As a result of pressure from France the provisions of equal pay were included in the Treaty of Rome. France ratified the ILO/Convention 100 in 1954.

Germany : The constitution of the Federal Republic of Germany guarantees equal right to men and women and the principle of equal pay is therefore, applied, in the Public administration. The EEC Commission believes that in some branch of industries e.g., metal-working, chemical and paper industries, the discrimination is maintained through "heavy work" and "light work". But the German employers maintain that as the difference is only a factual one, it does not amount to discrimination.

Netherlands : In Netherlands the existence of a national job evaluation structure makes it impossible to practise discrimination between men and women on the basis of heavy or light

work. Netherlands has not ratified the ILO Convention 100.

Italy : The Italian Constitution of 1947 accepted the principle of equal pay for equal work for men and women workers. It is believed that equal pay is said to be fully applied in the public sector. Italy ratified the ILO Convention 100 in 1956.

Luxembourg : Luxembourg ratified the ILO Convention 100 in 1967.

Belgium : Belgium ratified the ILO Convention 100 in 1952. It is believed that the differentials between men and women of 10% are to be maintained through collective agreements in many branches of industry.

U.S.A. : In U.S.A. Montana and Michigan first enacted the equal pay followed by 34 other States. U.S.A. have not ratified the ILO Convention 100 because of the lack of uniformity in the States' legislation. Title VII of the Civil Rights Act of 1964 prohibits any employer to maintain discrimination, on the basis of race, religion, colour, sex or on any other grounds.

It has long been advocated by the critics including the Politicians, and trade unionists to extend the facility of "equal pay" to women as well. They have argued that women should not be denied through prejudice or tradition the right to equal pay and the opportunity to employment. On the contrary, they should be given the necessary opportunities by providing for the proper and appropriate education, training, experience and promotion which will enable them

to make their contribution.

The introduction of any new or novel scheme will have to pass through many difficult periods of trials and experiments, failures and will have to face practical problems.

The assumption is that the lower general demand for women has arisen from the inferior physical strength of women, coupled with their shorter industrial life, their greater tendency to absenteeism, and the poor inadaptability to respond to the changing or abnormal situation. In addition to the above grounds the traditional attitudes, e.g., convention, prejudice, and restriction in certain areas of employment, are the dominant factors for the cause of non-equal pay. The weaker trade union organisation of women is also the key factor for the inequality of pay.

Thus the main cause of unequal pay appears to be the lack of opportunity for employment. The general assumption is held that man's wages must be higher in order to meet the needs of the family. The fear of unemployment of men has been a leading factor to restrict the opportunities for employment of women in some fields of employment. Absenteeism, lower turn-over etc. poses a serious problem for industries employing higher numbers of women.

The relaxation allowance is comparatively enjoyed by women to a greater extent as against men. The following figures from the ILO's "Introduction to work study" will show the justification of comment.

Type of Allowance	Relaxation %	
	Male	Female
Personal ...	5	— 7
Fatigue (basic allowance) ...	4	— 4
Weight lifted ...	13	— 20
Total ...	<u>22</u>	<u>31</u>

The arguments about equal pay for women appear more complicated particularly when the

equal pay will be related to work. Moreover, physically, mentally, and emotionally men and women are not equal but complimentary to each other.

In the light of the above causes it is felt that the application of the equal pay system will confront with some acute problems in industries that are to be faced in its implementation in the industries. The choice lies between (1) "equal pay for the same work" (2) "equal pay for work of equal value." Some protagonists have preferred to accept the former no (1) because of its being less open to differing interpretations. We may consider the conception of "equal pay for work of equal value", value being determined by job evaluation. Although the payment according to a valuation of work within an agreed system is an ideal and desirable but nevertheless, is not always achieved.

In order to cope with this problem what is needed at present is to lift the barriers of sex differentials and discrimination in regard to employment and in particular, remuneration should be the limited objective. If the opportunity in regard to employment facilities are given equally to women, then the pace of movement in effacing the discrimination from the face of the industry will be speeded up.

The extension of the facilities of equal pay to women means a sudden rise in pay which may lead to an inflationary effect. The cost will have to be met out of increased productivity and men's wages. Planning is necessary to eradicate the discrimination in pay regardless of sex.

More employment of women means more substantial costs to be incurred by the industry. This will lead the employers to seek escape avenues in order to evade the costs. If the Personnel Managers can give a proper lead to their management and also the trade union officials adopt a constructive attitude in dealing with the problems and follow such courses as the flexible working arrangements including the

opportunity of part-time work, reduce dependence on over-time work, use of abilities, skills and experience, only then the scheme can work out successfully. They should make proper arrangement for training and education to women so that it will help to reduce costs in the long run as well as in the short run.

Conclusion :-

It is desirable that the Personnel Managers and the Trade Union Officials should adopt a

realistic view of the future. It is largely concerned with getting a change of attitudes. The changes of attitudes are urgently needed if the industry want to benefit from the ending of discrimination. Apart from the Managements and the trade unions, both of which have essential role to play, the educational and social process (Institution) have equally a vital part to play in order to make the concept of equal pay effective and acceptable to all concerned.

Is Socialism Realisable Within The Framework Of the Indian Constitution ?

By

Bankim Chandra Bhattacharyya, First year
LL.B. Student.

The above, no doubt, is the burning question of the day in the field of Indian Politics. But I would deal with it in this article neither from the Political angle nor from the view point of a student of Political Science. Only the concern of a student of Indian constitutional Law is expressed here.

Never-the-less, before doing that I would delineate in clear and unambiguous terms my conception of Socialism which I shall have to refer to again and again in this short article.

Socialism may be simply described as those ideas which deal with the well-being of the society as opposed to the individual welfare and even by sacrifice of individual privileges to some extent. In this process it aims at the eradication of poverty in equality and at the prevention of instability in the economic conditions of the people. But its aims vary from the mild Owenism which envisages the automatic replacement of the competitive type of Capitalist economy by a Co-operative Organisation of industry due to the change in the minds of the people who gradually realise the inadequacy and inherent weakness of capitalist method of production to the class-war foreseen by Marxism and the consequent capture of the State power by the Proletariat and

the ultimate creation of a classless Society. Here, however, we shall confine ourselves to rather moderate targets of the utilisation of National wealth for the welfare of the community, a minimum living standard of all the people with all necessities and some comforts and the absence of exploitation. Nationalisation of the natural resources, socialisation of the means of production in some spheres especially in case of essential services and supplies will, undoubtedly, be one of the methods of achieving it.

Now let us examine how far the Constitution of India allows these objectives to be fulfilled. The distribution of the material resources of the country in a way to subserve the common good is a directive principle of the Constitution under Article 39. But even these provisions are not justiciable. So, although, they have been declared to be fundamental in the governance of the country, their place is inferior to the Fundamental Rights of a person to acquire, hold and dispose of property. It may rather be said that the property rights which have been incorporated in Part-III of the Constitution will control the directives to the state to arrange for reasonable and fair distribution of our natural resources and other means of production. There are

further commendations that our national economy will be directed in channels which will forbid the creation of monopoly of capital and business and will prevent exploitation of workers and consumers. Unfortunately just the reverse has happened. Even mild agrarian reforms like the abolition of Zamindari system and the extinction of the intermediary interests other than those of the tillers of the soil had to be carried out in the teeth of fierce opposition which had been fortified by this Fundamental Right to property. The Constitution had to be successively amended and added to for carrying out these reforms. In other directions also some steps have then taken. As for example, in West Bengal the management of the undertaking of the Tramway Company Ltd. was taken over by the West Bengal Government in 1967 for a limited period of three years in the public interest in order to secure the proper management of the same. This could be effected because of the First and the Fourth Amendment of the Constitution in 1951 and 1956 by virtue of which Art. 31 A was added in Part III (Fundamental Rights) and added in Part III. (Fundamental Rights). A more far-reaching change is envisaged in The Banking Companies (Acquisition and Transfer of undertakings) Act. By virtue of this Act, 14 scheduled Banks have been nationalised in order to serve better the needs of development of the economy in conformity with the National Policy and objectives and for matters connected their with or incidental thereto. The object avowedly appears to be what has been laid down under Article 39(b) in Part IV of the constitution (Directive principles). This Act has apparently been sought to be protected under Article 31(1) (d) of the Constitution notwithstanding the abridgement of the so-called Fundamental Rights of the Directors and the Share-holders to property under Articles 19 and 31.

The Supreme Court by majority decision in the case of L. C. Golaknath Vs. State of Punjab has forbidden any further amendment of the

Fundamental Rights by the Parliament from the 27th day of February, 1967 and onwards. So any further inroad into the provisions of Part III even in the national interest under ordinary circumstances is impossible. Only another Constituent Assembly is possibly competent to effect changes in this Part.

It is well-known that our Judges, as in other countries, are the zealous guardians of traditionalism and conservatism. They can not and do not readily appreciate and anticipate the changes in the drift of this country. And it will take time for them to understand that the flexibility of the constitution even in respect of this Part of Fundamental Rights is essential for preventing any violent changes in the country. But surely those assumptions are far from true. In the Full court hearing referred to ante Justice Hidayetulla (now the chief Justice of India) who was one amongst the Majority Judges opposing any further amendment of Part-III observed (in his separate Judgement) that in his opinion it was an error to accept the theory that the right to Property is a Fundamental Right and to incorporate that in our Constitution. He further referred to the resolution of the National Planning Committee of the Indian National Congress in 1947 that land with its mineral resources and all other means of productions as well as distribution and exchange must belong to and be regulated by the community. About the payment of compensation for deprivation of property have also mentioned the warning of Mahatma Gandhi that if compensation would be paid, we would have to rob Peter to pay Paul. Unfortunately, this is the very basis of the general complaint against the incidence of heavy taxation now prevailing in the country. However, the amendments effected before February, 1967 have already widened the field of payment of compensation and have also moderated the amounts of compensation to be paid. We are not sure if this petrification of Part-III of the Constitution will be permanent

or not till another Constituent Assembly is convened.

If we really mean the utilisation of our National Wealth for the common weal, the least we can do is to insert such a provision as is found in the Basic Laws of the Federal Republic of Germany which is, so to speak, not even a full fledged Socialist country. In Article 14(2) of that constitution it is laid down that property imposes duties. Its use should also serve the common weal. This provision should be incorporated as a fundamental right of the people and its enforcement should be made justiciable. This is the minimum which should be done to give impetus to the Socialistic tendencies now being reflected in the policy of the Government.

The communal possession of property existed in almost every early society. So this is regarded by many Socialists and Jurists as the Natural Law. But we can not at the same time ignore the fact that individual property rights grew with the advancement of Society. Now this individualism has grown to such an extent as instead of advancement, it is not only retarding the progress but also undermining the very existence of the Society. It is, therefore, high time to give a check to this growth. Never the less, individual property cannot altogether be done away with. By the constitution of the Union of Soviet Socialist Republics the personal properties of a citizen and his rights thereto are guaranteed and protected by Law. The constitution of the People's Republic of China in an Article of the same number goes so far as to provide for the protection according to Law of the right of capitalists to own means of capital and their capital, although this is only for the time being and the over-all State Policy is that these should be subject to constant control and supervision and will ultimately be transformed into various forms of State capitalist economy. What is particularly meant to be said here that even in communist countries like China and

Russia there is still scope for personal property and even capitalist system of production because nationalisation has not always and everywhere been found to be the panacea of all evils.

It will be appropriate to mention here about the blanket impositions on the right to property, as to found in the constitution of Mexican United States to the effect that the Nation shall at all times have the right to impose on private property such limitation as public interests demand. Provisions in the nature of those as found in the constitutions of Federal Republic of Germany and of Mexican United State should be embodied in the Fundamental Rights Chapter of our constitution, if Socialism is really meant to be achieved.

The next question is how to implement the plan of minimum living standard for all the people with all necessities and some comforts.

This can be realised if our National wealth reaches a standard of sufficiency. Whatever may be the jugglery of Statistics, it can not be gainsaid that even in respect of necessary supplies and essential services we have not enough. No political Party will dare contradict that India is an under developed country. At the same time it is also admitted that India has vast natural resources, even now un-tapped to a great extent and a teeming population. The theory of Ricardo later improved by Marx that labour alone creates values and thus adds to wealth however much it may be criticised from the point of view of the Economists, can be best applied here. So all must have to work. This has been in a round-about way admitted in Article. 39(a) of the constitution wherein it has been directed that the citizens, men and women equally, have the right to an adequate means of livelihood. But this has all these years been a mere pious wish. It was not made a justiciable right, probably thinking that it can not be immediately achieved. But for long 20 years inspite

of our best wishes we have not been able to progress even an inch nearer it; on the other hand the present situation shows that we have rather moved away from it inspite of our Five Year Plans. It is for the politicians to find out the causes thereof. From the legal point, it is being discussed now. None will in this country dare say that any law will be able to create employment for all. But when we look at the Constitutions of other countries of diverse Political creeds like Japan and U.S.S.R., we find that the right to work has been granted to their people as fundamental one by these countries. The U.S.S.R. in Article 118 of chapter X for fundamental Rights and Duties of citizens of her constitution provides that citizens have the right to work, that is the right to guaranteed employment and payment for their work in accordance with its quantity and quality. The Yugoslavian constitution guarantees to her people the right to work and the freedom to work. Even in Japan where the Economy is certainly not Socialist, all people shall have the right and the obligation to work according to Article 27 of their Constitution. If this be so, why in India we should fight shy to grant to the people their fundamental right and obligation to work. In rural areas Government have already undertaken such a task of providing work in case of wide-spread unemployment. If this right and obligation to work are now transferred to the Part for Fundamental Rights and made justiciable, the Authorities will perforce be roused to think afresh, will at the same time be benefited by the obligations of a legion of townspeople to work, when there remains so much to do. At least it is bound to create a fresh outlook free from all cliques and coterie-rule in view of the vastness of the problem. This will also strengthen our Labour Laws to the benefit of both the employers and the employees.

The third objective of the eradication of exploitation, that is the taking of undue privileges by one class from another and by one person from or, another, has not only been expressed in the preamble of the Constitution by the resolution of the people to secure equality of status and of opportunity but also been inserted in the Parts for Fundamental Rights and Directive Principles under Articles 23, 24, 39(d), 39(e) and 39(f). Summarily, these Articles of Part III prohibit traffic in human beings, forced labour, employment of children in factories and hazardous work and the Articles of Part-IV aim at the prohibition of the employment of women for the same work at lower wages, of the employment of labourers to the detriment of their health, taking advantage of their economic necessity and the taking of advantage of childhood and youth which results in the moral and material degradation of the children and the young. While the first two Articles are made justiciable, the others are unfortunately not. There have, no doubt, been some legislation in respect of the above Directive Principles. Still it is imperative that Articles 39(d), (e) and (f) should be transferred from Part IV to Part III and be made not only justiciable but also the Indian Penal code and the Criminal Procedure Code need be suitably amended to make all lapses in thees respects criminal and cognizable offences.

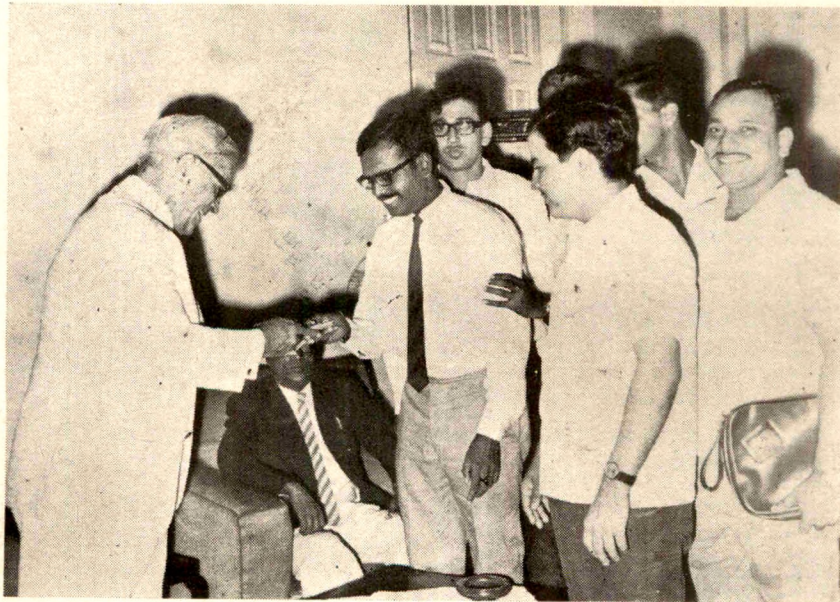
But that is not enough. The provisions for labour-welfare and Social security should be added to the Part for Fundamental Rights as have been done under Article 123 of the constitution of Mexican states and under Articles 37, and 38 of the Constitution of the Socialist-Federal Republic of Yugoslavia, covering such subjects as rest, recreation, health, minimum emoluments, disability and retiring benefits, service conditions etc.

Welcoming to Mr. Friedman



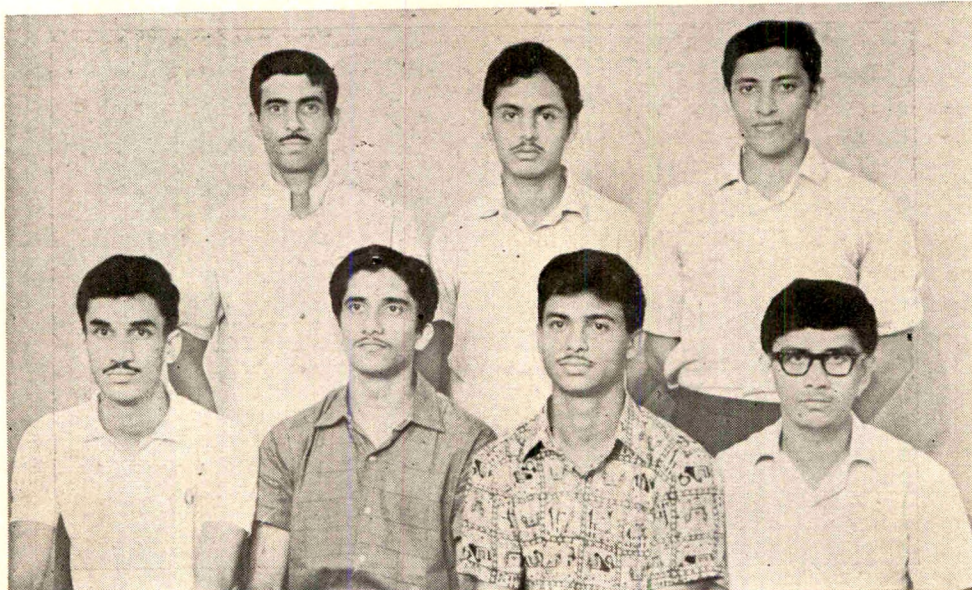
The Vice-chancellor, Dr. S. N. Sen on behalf of the students' union giving reception to the German Jurid Dr. W. Friedman, who visited Calcutta during the last year for Tagore Law Lecturer.

Donation to flood relief fund.



Mr. S. S. Dawan, Governor of West Bengal receiving donations from our students' union for the flood relief fund.

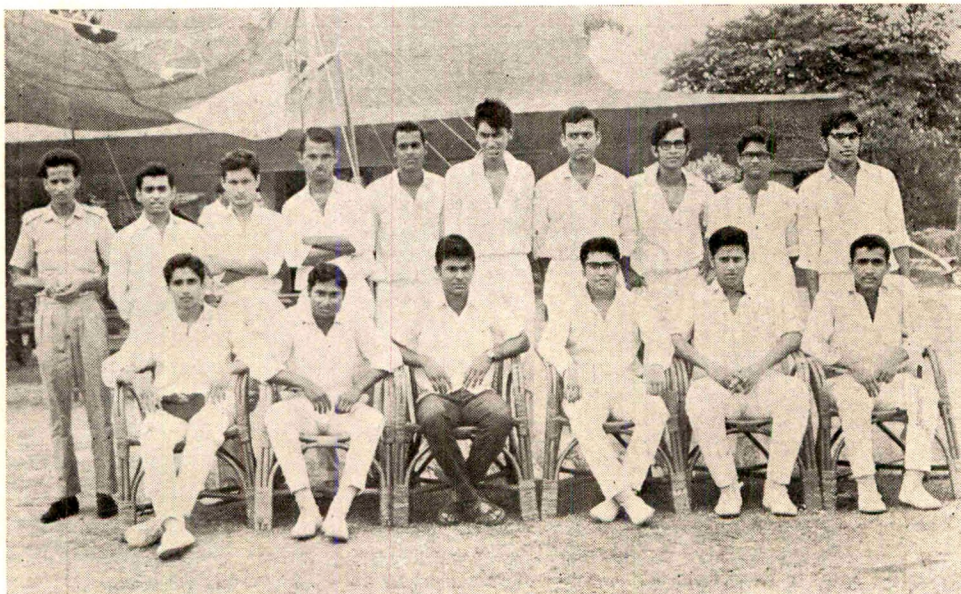
OUR ROWING STARS.



Sitting (Left to Right) A. K. Kanungo, S. Sarkar (Jr. Secy.), S. Banerjee (Jt. Secy), M. Sen.

Standing (Left to Right) D. Basu, A. S. Dutta Roy, R. Basu Ray.

OUR CRICKET HEROES.



Sitting (from Left to Right) S. Sarkar (Jt. Secretary), S. Poddar, S. Banerjee (Jt. Secretary), Deb Mukherjee (Captain), Subrata Guha, D. Hazra.

Standing (from Left to Right) Hari (Bearer), Sujoy Ganguly, U. K. Roy, S. Bhattacharjee, M. Das, S. Chakraborty, Subir Ganguly, Gopal Bose, S. Guhathakurta, Dilip Doshi.

The Constitutional Crisis.

By

Prof. Samir Kumar Ganguly.

There are two types of constitution with which any student of Law or Political Science must be familiar. One type is known as Unitary constitution, and the other Federal. In unitary constitution, the sovereignty is vested more or less in one central institution or organ whereas in a Federal constitution, instead of being vested at one point, it is spread out over several points and a mechanism is devised by which balance is maintained between these points.

Thus the British Constitution although unwritten is a Unitary constitution. In Britain, the Parliament, which is elected by the political sovereign, viz. the people, is supreme, and there is no law that the British Parliament cannot make or unmake. The British judiciary, although supreme in the sphere of interpretation and application of any law made by the Parliament, cannot challenge the validity of any such law. The British type of Political system is known as the Parliamentary democratic form of Government, and its successful functioning may be—primarily attributed to three factors. First, Britain is territorially small and compact, and its people have a uniform language and culture. Second, the British are a conservative lot of people who wish to maintain and reform their institutions gradually over the years. Third and the most important reason is that

there are only two or three well defined political parties with a National outlook, each one of whom is pledged to the successful operation of the constitution.

The American constitution is a federal type of constitution. Here all the constituent states of the United States which now number fifty two have their own respective state constitutions and hence state laws, their own state police, and their own state judiciary. These states by common consent have assigned certain items only for administration to the federal government in Washington, and the American congress can do no more than legislate on items assigned to them in the federal constitution. It is interesting to note that the Governor of a state is elected by that state and exercises—independent powers as long as they come within the ambit of the state laws. This makes the position of the American Supreme Court extremely vital in maintaining the balance, because it is not only called upon to interpret laws, but often has to decide whether the different sovereign bodies are not really transgressing into each other's jurisdiction. The American constitution has undergone and is perhaps undergoing severe stresses and strains only because there may appear a President who may wish to apply a standard of uniformity all over the country. By and large, however, the American constitu-

tion has succeeded because the Americans have a common culture and a common language and this natural uniformity has precluded all fissiparous tendencies towards disintegration.

Thus, there are a few state parties and a few well defined national parties which are all pledged to the preservation of the federal constitution.

In India, our constitution has borrowed both from the British and American constitutions but is on the balance more inclined towards the British type. Its substance has been summarised as being mainly unitary with only certain federal features. Thus the Parliament in Delhi is sovereign in more senses than one because it controls the power of Legislation on almost all vital matters. These items have been included in the Union list. There are certain minor items which have been assigned to the state legislatures which are included in the state list, and there is yet a third list, known as the concurrent list which contains items on which both the union parliament and the state legislatures can legislate. But the unitary nature of the constitution is more pronounced in certain other things. The President of India has enormous powers over the states which he can exercise jointly with the Parliament in Delhi. He can dissolve any state government and legislature, use emergency powers in relation to the states and the Governors in the states are more or less his representatives. The distribution of the financial revenue earned by the centre is made to the states on the basis of Recommendations of the Finance commission appointed by the President and such is also the position in regard to grants and subsidies advanced by the union. There are three checks upon the Indian President: First, He shall have a council of ministers to advise him; second, all his actions must be ratified by the union Parliament in Delhi which cannot be indefinitely suspended or dissolved; Third he may be impeached by the Parliament for violation of any provision of the constitution.

Why did the farmers of the Indian Constitution make it centralised and unitary? They had thought that in a big country like India such a diverse culture where nearly every region has its own ethnic and linguistic characteristics, it is necessary to have as much sovereignty as possible concentrated in the Union Parliament in Delhi. In the past, they pointed out, whenever the sovereign power in Delhi i.e. the centre had grown weak, there was invasion from outside and at times disintegration from within. Even in so providing for centralisation of power at the centre, they defined the powers of the other organs and institutions provided for in the constitution. Thus, the legislatures the executive and the Judiciary have their provinces clearly defined in the constitution, and whenever any dispute arises as to the interpretation of any provision of the constitution, the judiciary here is at liberty to give it any interpretation it likes. Over the last twenty two years major constitutional disputes have been settled one way or the other, because, not much difficulty was found in clarifying the provisions of a written constitution.

Unfortunately, recently serious difficulties are developing in operating this constitution. As long as there was one party rule, both at the centre and in the states constitutional tangles could be solved by inner party discussions and resolutions. With the defeat of the congress party in several states in 1967 and with the formation of multi-party coalition Governments in these states, great difficulties arose over interpretation and execution of the constitutional provisions. To take one example, the constitutional position of a state Governor is dual. He is at once the titular head of an elected Government of the State. At the same time he is the nominee of the President of India who usually is also a nominee of the ruling party at the centre. The constitution provides that the state Government holds office during the pleasure of the Governor.

If there is an opposition party running the state

Government which does not see eye to eye with the ruling party at the centre, the office of the Governor comes under severe pressure from both sides. If the Governor advises the President to dissolve the state Government for alleged disruption of law and order in his state he is accused of Partisanship in favour of the ruling party at the centre. If, again, he chooses to call the leader of one of the parties in the state to form a Government, he is accused by the other parties of sectarianism and partiality.

Take another example. The President of India at regular intervals appoints a Finance Commission to decide the lines on which the central divisible pool of money raised through union taxes like Income Tax, Customs, Excise Duty etc. are to be distributed amongst the states. The principles for such distribution are often varied and ambivalent. Proportions of distribution are based on the principles of collection, population, territorial size, backwardness of the state concerned etc. It has been West Bengal's justifiable grouse all these years that she has contributed the maximum to the central divisible pool, she has received the minimum in return because of overt and covert discrimination. The same charge is now being levelled by several other states in India where different opposition party Governments accuse the ruling party at the centre discriminating in favour of the states where the ruling party is in power. This charge is not only limited now to the recommendations of the Finance Commission, but is extended against the basis on which disbursement of plan and non-plan loans and subsidies are made to the different states.

It is clear, therefore, that with the disintegration of one party rule, the unitary constitution of India is under severe attack. The emergence of numerous state parties which irrespective of

their professed ideology have a regional character are exercising tremendous local pulls which are slowly eroding not only the unity of the country but also the unitary constitution which it was meant to embody.

Obviously the fathers of our constitution had made the mistake of anticipating an eternal one party rule or the emergence of two or three well defined political parties with a national outlook like those in Britain. With the disintegration of the congress party which was historically inevitable there have arisen numerous state parties which often combine for running the administration of the states but show no sign of merging or coalescing into well defined national parties with clear ideologies and programs.

It is difficult to predict how long this constitution can successfully operate under such trying circumstances. Apprehensions have been expressed that it might collapse by erosion from within and numerous jurists and politicians have asked for the convening of another constituent assembly to frame a new constitution for the country. It is clear that the present constitution is no more adequate to meet the political situation obtaining within the country. If the numerous regional parties cannot consolidate themselves into well defined national parties, soon the outcry for a federal constitution will be heard from all parts of the country. Regional parties restricted within one state or another would like to have greater autonomous powers for their respective states, so that they may be able to rule without interference from the centre. Whether such a constitution will be born organically through amendments of the present constitution or otherwise will be for the people to decide. At the same time how a mass of people with such diversity in culture will be able to maintain their unity and perhaps their freedom, will also be a matter of great concern to our leaders.

[The State Government cannot be dissolved, but only the State Legislative Assembly may be dissolved and the life of the State Council of Ministers may be brought to an end. The State Government always remains. *Editor-in-chief*]

A Study in the Hindu Law of Suretyship.

By

Prof. P. P. Modak.

Modern notion of Suretyship has two aspects. In the ordinary sense Suretyship is the relation occupied by a person liable for the payment of money or for the performance of an act by another, such liability being collateral as to such other person, and who is liable to suffer loss in the event of failure of such other person to pay or perform, but whose liability is terminated at once fully and completely, if such other person does pay or perform. As such a surety is the person collaterally liable for such payment or performance by another.

In the technical sense suretyship is a legal relation based upon contract between competent parties, in which one person undertakes, as the object of such contract, to answer to another for the debt, default or miscarriage of a third person, the third person's liability to the second person being thus similar to that of the first person. As such a surety proper is the person who undertakes, by an express contract for that very purpose, to become liable for the debt, default or miscarriage of another; the effect of the contract being that the liability of the latter is similar to that of the surety.

In contrast a guarantee is an undertaking that another person will pay a debt or perform a duty, such other person being primarily liable

for such payment or performance and a guarantor is the person who undertakes that another will pay or perform.

Thus the liability of a surety proper begins on delivery of the contract. He undertakes usually to perform jointly with the principal and is primarily liable to the creditor, while the liability of a guarantor begins on default of the principal. He undertakes that another will perform, and he is not jointly liable with the principal but only secondarily liable to the creditor. The liability of surety is concurrent and simultaneous, but the liability of guarantor is secondary and subsequent.

Suretyship may be classified as follows:

- (1) As to the form of contract—
 - (a) Voluntary
 - (b) Involuntary (by operation of law)
- (2) As to the nature of liability—
 - (a) Personal
 - (b) Real.

Voluntary suretyship arises where the chief object of the contract is to become surety. Involuntary suretyship arises where the chief object of the contract is to accomplish some other purpose than security, but its effect is to make one of the parties secondarily liable for a debt or for the performance of an act by another. Personal suretyship arises where the surety may be made to respond in danger generally for

a breach of contract. Real suretyship arises where certain specific property can be taken to enforce payment of another's debt, or the performance of some duty owing by another, and the owner of such property (if he would save it) must pay or perform, but he is not personally liable in damages.

This refinement of the English common law is unfortunately missing in Modern Indian law of suretyship as embodied in the Indian Contract Act. But there is enough of the legal concept to enable us to attempt a comparative study of Suretyship in Ancient Indian Law.

Suretyship was one of the 18 Titles of Hindu law known to the smṛiti texts. It was a contract whereby a man bound himself to be personally liable for obligation of another, as an accessory debtor, in addition to the person principally liable. Hence he was not a collateral surety but surety proper in the technical sense.

Prābhāvyam nāma viśvasā 'rtham
Puruṣā' nītareṇa Saha Samayah

[Mitakshara]

The above definition of surety touches on the notion of guarantee and though Nārada tries to clarify it by saying—Viśrambahetū dvāvatra pratibhū rādhir eva ca—he does not succeed. A guarantee (that is, collateral pronusi to answer for the debt of another) given to a creditor in Hindu Law may be two-fold—by the system of surety and by pledge. Thus there was in Hindu Law identification of the notions of surety and guarantee.

Suretyship is described some times by the name of Pratibhū [representative] and at other times by Lagnaka [bailment]. Vyāsa Smṛiti enumerates suretyship of seven kinds, Kātyāyana speaks of five, Brihaspati mentions four, Manu and Medhatithi explain only three. By eliminating common cases, we get from the Smṛiti texts no less than ten different kinds of suretyship.

(1) Surety for Appearance (Darśana, pradar-

sana, upasthāna). According to kātyāyana and Brihaspati, it was the obligation to produce the debtor at the time and place agreed upon between the creditor and debtor. On default, surety had to pay the debt, but not if prevented by Act of king or Act of God. According to Ratnakara and Vivādachintāmani of Vāchaspati Misra in the event of non-appearance by reason of death of debtor, surety had to pay. But probably this liability arose if death took place within six weeks from the given time and the debtor did not appear on the appointed day. The stipulations as to time and place was the basis of obligation.

Although the Smṛiti texts use the word ṛṇa (debt), this kind of surety was insisted for appearance in court and for contract of work. In case of non-appearance, as there was really no existing ṛṇa, surety was to pay a fine in the nature of liquidated damages fixed before or unliquidated damages to be fixed by the king or court.

As the surety had to enquire as to the whereabouts of the debtor, depending on the distance of the place he was hiding, the creditor allowed time to the surety. This period was generally six weeks. Except in case of death of the debtor, the liability to pay did not arise during this grace period.

(2) Surety for Honesty, Confidence, Assurance (Pratyaya Viśvasa). Surety assured the creditor that the debtor would not deceive him or that he was honest, trustworthy and willing to discharge the debt at the agreed time and place. In default, Surety was not a surety for payment. Here he assures honesty and willingness of debtor to repay. Therefore, if the debtor was a man of substance at the time of his loan, but due to no fault of his own becomes bankrupt, surety was not liable as the debtor may continue to be ready and willing to discharge his debt after expiry of the due date. In this case, had the surety been a surety for payment, he would be at once liable. But here his liability arises

only on the proof of dishonesty and unwillingness of debtor to pay during the pendency of the debt. The surety did not assure debtor's capacity to pay at the appointed time and place. He merely convinced the creditor that he could lend money on his assurance that the debtor, if capable to pay, would not deceive him.

(3) Surety for Payment (Dāna). It was a contract whereby surety found himself to be personally liable for the debt of another. It was effected almost in the form of a Roman Stipulation—the surety putting the question and answer in the subjunctive mood within the hearing of the creditor—“yadyayani na dadāti tadānim aham eva dāsyantī” (If he does not pay, I will). If the debtor evaded payment at the appointed time and place, surety's liability arose forthwith. Fraud or poverty of the debtor was no excuse for the surety.

The liability of this surety extended to the natural corollaries of a debt. He was liable for interest too.

(4) Surety for Return of a Chattel borrowed by debtor (ṇidrayārpana). For example X may borrow a loom from Y for six months. The promise to the creditor by surety can be condensed as “draviṇamarpatām bhyapara” or I will deliver your asset, if the debtor does not.

The subject matter of debt could be any kind of moveable property or asset capable of transfer by delivery.

The liability of this surety was very strict. He was answerable even if the asset was destroyed by act of enemy or vis major. If X told Y “give me your ornaments for the festival day at my house” and Y asked “if you donot return, then what shall be done” and if Z the surety assured “I wil restore them”, Z cannot escape by saying that the ornaments were stolen by third parties for no fault of his.

(5) Surety for Litigation (Vāda). When the judge wanted to assure that his judgment would be best satisfied by demanding surety from both parties, he made an order to that effect. This surety assured the court that the decree would be properly executed or the defendant would appear in court. But this surety was not a condition precedent in all litigations, but only when it was necessary for the ends of justice and that too never from one party. It was mainly to prevent the defendant from absconding or hiding. It was a security for his appearance.

(6) Surety for Ordeal (Śāpatha) or divvyā). It was connected with surety for litigation particularly and sometimes with surety for appearance. It was sufficient if the surety stood for the performance of ordeal, which was the substitute for performance of obligation. If the ordeal proved innocence, performance of obligation was dispensed with.

(7) Surety for Safety (Abhaya). If any person was fined or punished for injuring another and the wrongdoer was in a position to threaten or revenge upon the injured person, he was compelled by court to furnish surety for the safety of the injured person or complainant for life. This surety found himself by assuring the complainant—“you have no fear from him”. This type of surety thus resolves into a surety for honesty on the part of the wrongdoer. The object was to prevent future breach of peace, and for safeguarding present concluded peace. According to Kautilya, the object was not to guarantee the peace but to strengthen it. This surety was not treated as a hostage. He was generally rich and powerful and responsible financially for the breach of peace.

(8) Surety for Return of Pawned Goods from pawnee to Pawnor (Gṛhita bandho'pasthāna). It was really a specialised form of the fourth kind of surety stated above.

(9) Surety for a Written Document (lekhye'-

kṛte). It was a specialised form of surety for ordeal.

(10) Surety for work. It was a specialised form of surety for appearance for work.

Certain persons were disqualified in law from becoming surety due to relationship or in capacity. Some other were considered generally unsuitable e.g., those who could not stimulate confidence due to financial position, those with limited power of disposition and persons holding special positions. Certain persons were absolutely unsuitable e.g.

Svāmi, satruḥ, ādhikṛta, niruddha, daṇḍita
Samāyasthā, rāja-kārya-niyukta, pravrajita etc.
[Kātyayana 114-116].

As to the responsibility of surety in the event of non-performance of obligation by the debtor, he was given two facilities—(a) repayment of debt by instalments, (b) postponement of repayment of debt. Brihaspati and Kātyayana give us the idea that sureties should get reasonable time and they should not be harassed, Medhatithi argues that they underwent suffering for others and having no selfish motive, they should not be forced to do the work. Brihaspati allows the surety instalment and postponement, where surety has to search for the absconding debtor. The period of postponement varied according to circumstances, the distance and place of hiding-up to a maximum of six weeks.

The surety had a right of reimbursement from

the debtor after he had fully performed his obligation to the creditor. The concept was the same as we find today in the existing law, that is, a contract of surety included a contract of indemnity. The principle of subrogation prevailed and surety was entitled to the simple amount paid with interest and expenses incurred [Brihaspati X-83 and Kātyayana 540]. But in the event of surety's harassment in public, he was entitled to double the amount paid by him [Yājñavalka (II-56), Nārada (I-121), Brihaspati (X-82), Kātyayana 539]. Certain exceptions to the rule of double reimbursement are found in Yājñavalka II-57. It is there laid down that the debtor had to give the surety the calves of female animals, children of female slaves and in case of corn, cloth and liquids—threefold, fourfold and eightfold respectively of the principal amount.

As to the responsibility of co-surety, Kātyayana gives detailed law. His obligation towards the creditor could be solidary or proportionate, depending on the text of the contract. Where the sureties have declared joint liability for the whole debt, it was solidary. Where it was declared to be several, then also the obligation was solidary. But where they each promised to assure a certain stipulated portion of the whole debt, the liability was pro rata [Yājñavalka (II-15), Nārada (I-120)]. If there was no agreement as to the nature of liability, the shares of co-sureties were equal.

The vast Sanskrit literature is sprinkled with examples of various kinds of sureties. These non-juridical sources demonstrate the law rather than enunciate it.

SOME THOUGHTS ON LEGAL EDUCATION

By

Justice T. K. Basu, Judge, High Court, Calcutta.

Various controversies have been raised from time to time on the question of legal education and its possible reforms. For instance, according to one view, study of law should be one of the subjects in a Degree Course for undergraduates. In other words, Law should be a subject for a Bachelor's Degree like Economics or Philosophy. The advocates of this school of thought point out that, under the present system, in which law can be studied only after a student has graduated in some other subject, involves the loss of a period of three years, a long and valuable period in the life of a student who ultimately has to launch himself in life as a legal practitioner to eke out a living. This view has been advocated, I find, by Justice P. B. Mukharji (as he then was) in an Article on the Reform of Legal Education which has been published in this Journal in 1969. The other point of view would be that a good general educational background may be a necessary and useful equipment for a successful legal practitioner. It may be said that perhaps the Higher Secondary stage is too early for getting that good general background. A Bachelor of Arts or Science would be in a better and stronger position to cope with the many and various facets of diverse subjects which impinge on various fields of the Sciences and the Humanities and which a lawyer has inevitably to tackle in course of his professional life.

Then there is the other controversy as to whether the study of law should be a full-time course like the other subjects of Under-graduate or Post graduate studies as distinct from the present sys-

tem of studying law for one period of 50 minutes, which, in actual practice, may perhaps mean half an hour of legal education a day!

It is not the object of this article to deal with those controversies. It is proposed to deal with certain practical problems with regard to legal education particularly with reference to the system prevailing in our Law Colleges at Calcutta.

The LL.B. Course which obtains in Calcutta, today is primarily a course of professional training. In this sense, it is comparable with the course of C.A. for Accountants, M.B.B.S. for Doctors and the various Engineering Degrees for Engineers. It is true that those who intend to go in for academic work in the sphere of law and jurisprudence and who may ultimately become Jurists of national or even international repute will have to undergo the same course at the beginning because there is no other course of theoretical studies in Law and Jurisprudence available in our State. Of course, the Academicians and the Jurists may avail themselves of the facilities of Post-graduates Studies such as LL.M. or LL.D. Unfortunately for us, the number of such persons are very few. It is common knowledge that even most of the teachers of law in the LL.B. Courses at Calcutta are themselves professional lawyers who undertake this job in addition to their practitioner's work. This system may have both its advantages and disadvantages which itself may usefully be the subject matter of a dissertation for a research student of the system of legal studies! To come back to the subject, however, I think it will be

true to say that the large majority of those who study law do so with the object of taking up the profession of a practising lawyer. For most of them, it is just another profession which would help them to earn a livelihood and a comfortable one at that!

If the above assumption is correct, then it should follow as a matter of course that the course of studies in law should have an essentially practical bias. In other words, the theoretical study of law and its practical application in the future professional work of a lawyer should receive equal emphasis in a properly framed course of legal studies and training.

Unfortunately this practical aspect or what may be called the "applied" part of legal studies, as distinct from its "pure" or "theoretical" part, does not appear to have received its proper emphasis in the present system. Its importance does not appear to have been adequately appreciated by the framers of the present course of studies in law. If analogies may be permitted—and analogies are not always bad logic—what a Hospital is to a Medical student or a Machine Shop is to a student of Mechanical Engineering, the Courts of Law are to a student of law. Can one imagine a student getting a degree in Mechanical Engineering without even seeing a Machine Shop? Can one dream of a Medical Graduate who has never seen the inside of a Hospital? Yet, under the present system, it is possible for a law student to graduate, even with flying colours, without seeing the inside of a Court of Law!

This system has its inevitable shortcomings for the future legal practitioner. It is the common experience of many young lawyers, some of them with a brilliant academic record in the study of law that, when they join the Law Courts, they find themselves at sea tossed about by waves of the endless wranglings of procedural laws! Sometimes it takes months and even years before these helpless young men can find their moorings. The

unfortunate result of all this is that several valuable months or even years are wasted in this process of coming to grips with the practical working out of the procedure obtaining in Law Courts.

The reason for this is not far to seek. Law as it has developed in this country and elsewhere is both substantive and procedural. The practising lawyer has to equally familiarise himself with both the substantive and the procedural aspects of the law. It is the experience of every lawyer that the procedural part of the law can only be adequately grasped by watching its actual working out in the Courts of Law. For instance, in the trial of a Suit questions like Settlement of Issues, preliminary arguments on onus of proof, or the question who is to lead evidence first and who is to begin the arguments after the evidence is closed are things which can only be properly understood and grasped after a careful watching and ultimately the actual handling of a *Nisi Prius* action in a Court of Law. Such things can hardly be adequately understood by a study of the relevant provisions in the Code of Civil Procedure or the Rules of the Original Side of our High Court in vacuum. This is equally true of the procedure which sometimes leads to endless wrangles in the Interlocutory Court in dealing with the Motions and Chamber Applications. A study of Chapter VI of the Original Side Rules of the High Court can hardly equip the practising lawyer to cope with this job unless he is familiar with how it is worked out in actual practice in the Court of the Judge taking Chamber Applications.

This vital gap in legal education has to be closed. This can only be done by making it compulsory for every law student to attend the Law Courts—the High Court and may be a District Court or even a Police Court—before he or she passes out. This should preferably be done in the last year of studies when the student would be comparatively better equipped to appreciate

and absorb what goes on around him. During such attendance in Courts, the students should be required to watch a prescribed minimum number of cases e.g., Criminal trial, Interlocutory Applications, Chamber Applications, Civil Appeals, Criminal Appeals, Civil and Criminal Revisions and even Income-tax and Sales Tax References. In course of such attendance to these various types of cases, the student should be required to submit short Reports of his or her understanding and appreciation of various cases including an analysis of the points involved for decision in such cases. A certain number of marks, say 50, should be allotted during the final year of law studies which would be awarded on the basis of these Reports of inspection of Law Courts and Cases.

It may be said that a student attending Law Courts for the first time will be able to understand and absorb very little of what is going on around him. This comment is undoubtedly justified to a large extent. It is not suggested that, with the nature of the course of our law studies being what it is, the student at the beginning of the inspection of Law Courts would be able to take in very much. This problem can, however, be partly overcome. After all, a good number of lecturers in the Law Colleges are themselves active legal practitioners. They could, perhaps 'brief' the student with some useful clues which would act as rudders before they embark on their voyage through the Courts of Law.

There is another aspect of this problem of practical training which may be mentioned at this stage. It is to be remembered that the principal task of a civil lawyer is to apply the law to the given facts of a particular case. It is a truism to say that there can be no legal decision which is divorced from the facts and circumstances of a case. That being so, the primary task of a civil lawyer falls into two broad divisions. First and foremost is to understand, analyse and grasp the material facts of a particular case. The

second task, and this aspect will be dealt with at a later stage, is to find out the legal propositions with reference either to the relevant Statute Law or by an intelligent pursuit of the judicial decisions bearing on a particular point or points and usually it is a combination of both—to apply the law to the facts of that case.

The primary endeavour therefore is to come to grips with the facts of a given case. This calls for considerable exercise in methodology and training. This training generally starts in the life of a lawyer when he is "devilling" with his Senior in his Chambers after he has been sworn in as an Advocate of the High Court at Calcutta. This training, as every practising lawyer knows, consists of the preparation what is known as a List of Dates which really means an analysis of the material facts of a particular case with reference to dates of transactions which are set out in a Chronological order. This perhaps is the most useful exercise at the beginning of a professional lawyer's life. Why not make a beginning with this exercise during the student days? This would provide the necessary training and perhaps reduce the "period of gestation" which every junior has to pass through before he is considered competent to handle a case in a Court of Law. Similarly, in some cases it is necessary to analyse the documents and correspondence in the form of a precis in which the relevant points and facts are sorted out and are segregated from the ir-relevant ones. This training could also be usefully started during the student life of a future lawyer.

Connected with this aspect of the question is the very important exercise in the drafting of pleadings. No doubt the present syllabus does have a certain number of marks allotted to drafting of pleadings. Such a drafting of pleadings, however, it is to be remembered, can hardly be effectively done in vacuum unless the student has before him the relevant documents and correspondence out of which a Complaint or a Written

Statement or a Petition or an Affidavit-in-Opposition is drafted out by a practising lawyer.

The High Court at Calcutta has always boasted of a number of lawyers who take an artist's delight in the drafting of pleadings. It is possible, with a certain amount of effort and co-ordination, to place before the students a few "representative" specimens of pleadings with reference to the documents and correspondence out of which they were born so that the student has a practical idea of how the thing is done. Teaching how to draft pleadings with the help of Ghose's Pleadings—and this is not to undermine the excellence of the Treatise—is, it is submitted, no substitute for this.

The second important aspect of the practice in civil law, as already indicated, is the application of the law to the facts of a given case. Sometimes, and this is very rarely the case, the law can be found only in the relevant Statute whether it is the Contract Act or the Sale of Goods Act or the Income-tax Act. In most cases, however, the relevant statutory provision has to be read, understood and construed in the light of the judicial interpretation bearing on the relevant provisions of a Statute. This is what is known as Judge-made law.

Needless to say, this Judge-made law is to be found in the appropriate reported decisions on a particular point. The enquiry into such reported decisions very often takes the lawyer beyond the territories of India. This pursuit may involve reading up of some English or even American cases. Sometimes the enquiry stretches further afield and involves looking into some of the decisions of the Courts in Commonwealth Countries or Appeals to the Judicial Committee of the Privy Council from different Commonwealth Countries like Australia and Canada,

This exercise of pursuing a particular point of law with reference to decided cases has a methodology of its own. Every practising lawyer knows that there are valuable clues furnished by several Digests, Subjects Noted Index of Cases, Index of Foreign Cases etc. in following this pursuit. How many student of law however know what is meant by "following up a case"? This exercise in methodology is usually commenced after the law graduate embarks on the career of a legal practitioner and sometimes takes years before the technique reaches even a degree of reasonable efficiency and perfection.

Why not initiate the law student, in course of his studies, in the methodology of this pursuit of a point of law? A mere study of some of the Leading Cases on a particular aspect of law will not achieve this result. The student has to be taught how to read Head-notes of reported decisions. He has to be taught how to segregate the point relevant for a particular proposition in the decided cases from the other points decided which may have no bearing at all on legal principle in issue. He has to be taught how to follow up the earlier decisions which are noticed in a subsequent case. He should be familiar with how an earlier decision which has an apparent bearing on the same question is distinguished by the Judge deciding the later case.

It is to be remembered that it is not so important in the life of a practising lawyer to know by heart which particular case decided a particular point. What he must know is how to find out with reference to the reported decisions and the textbooks on the subjects where a particular proposition of law is to be found. This perhaps is the most important of the "tools of trade" of a legal practitioner. The first steps in the acquisition and handling of this very important tool of the lawyer's trade should be taken in the student life of a prospective lawyer. Otherwise, the law graduate is under an unnecessary and avoid-

able handicap when he takes his start in the running track of the legal profession.

In conclusion a word on the syllabus prevailing in the University College of Law. It is found that the New Syllabus which has come into force from June, 1969 contains certain welcome changes. There is a greater rationalization in the field of legal studies. The List of Leading Cases in the different subjects is certainly more up-to-date. According to a section of the student opinion, the leading cases are far too numerous for them to cope with having regard to the fact that there are now six papers in each year of Preliminary, Intermediate and Final Law.

Be that as it may, it must be remembered that

the law evolved by the process of judicial interpretation is essentially a dynamic and a growing body of law which changes almost every year. Greater emphasis should therefore be given on revising the list of Leading Cases, if possible every year, to see that the more recent and authoritative decisions particularly of the Supreme Court of India are incorporated as part of the course of studies.

These are some stray observations and rambling thoughts on the question of legal education in this State and its possible re-orientation in certain directions. If these thoughts and observations provoke sufficient discussion and thinking in the appropriate quarters, it would have served its purpose.

The Memory of Judge Sir William Jones, Kt.

By

The Hon'ble Mr. P. B. Mukharji, Chief Justice,
High Court, Calcutta.

The calendar of the life Sir William Jones is today a forgotten inspiration. No man has done more for India than he. It is astonishing to believe that so much was done by a life so short as covering only a period of 48 years. He was born on the 28th September, 1746 in London. He died in Calcutta on the 27th April, 1794. He dies buried in the soil of Calcutta.

The landmarks of his life will show his prodigious achievements. In the year 1753 while only a boy of seven, he brilliantly and successfully matriculated from Harrow where his career and tutor's report show the future scholar. At the age of eighteen in 1764, he passed out from the University College, Oxford, again with brilliant and high honours, winning awards, prizes and scholarships. In the very following year, he became a tutor of Viscount Althorp, later Earl Spencer. At the age of twenty in the year 1766, he was elected to a Bennet fellowship at Oxford and had his first meeting with Anna Maria Shipley who was to be his wife seventeen years later in 1783.

His first publication was in 1770 on the history of Nadir Shah and an unfinished epic outlining of "Britain Discovered". His interest in oriental languages, oriental traditions and oriental culture was evinced from his very early boyhood. He appeared to be a man marked for the East but the future was still uncertain. He did not know what would be his life's avocation. Almost

by a chance destiny he became a law student of the Hon'ble Society of Middle Temple and was such a student from 1770 to 1773. He was called to the Bar in 1774 and practised as a London barrister and circuiter from 1775 to 1783.

Within the period from 1771 to 1783 significant events happened in his life. In the world of scholarship he wrote in 1771 a "Grammar of the Persian Language" and a "Dissertation on Oriental Literature". In 1772 he published a book of poems consisting chiefly of translations from the Asiatic Languages. The University of Oxford awarded him the Master's degree and he was elected to Dr. Johnson's Club in 1773. For a while he interrupted his practice at the Bar, and took an appointment in 1776 as a Commissioner of Bankruptcy. Then followed a strange interlude in politics. A scholar is hardly ever at home in politics. In 1780 he was an unsuccessful candidate for an Oxford seat in the House of Commons. In that year, he wrote "An Inquiry into the Legal Mode of Suppressing Riots" and delivered a speech on "On the Nomination of Candidates to Represent the County of Middlesex". His first trip abroad was in 1779 to Paris to see Franklin which was followed by a second trip in 1780 and a third trip in 1782 also with the same object. He wrote two books on law; one was on the Mahomedan Law of Succession to the Property of Intestates in 1782 and the other was "An Essay on the Law of Bailments" in 1781. In 1781 he also assisted Burke and others on Indian Legislation.

During this period of time he wrote also on other subjects and composed poems. Reference may be made to "The Muse Recalled", "An Ode in Imitation of Alcaeus" and "An Ode in Imitation of Callistratus".

While as a young Hanoverian he started his studies of French, Italian and Spanish languages. To these he added Hebrew, for he wanted to read the Bible in the original. Hebrew led him to middle-eastern literature and he came to the study of the Arabic writing system. So great was his reputation as a student at Harrow that Thackeray declared, "The boy's mind was so keen that he would find the road to fame and wealth even if left naked and friendless on Salisbury Plain". Dr. Sumner, the Headmaster of Harrow, was amazed at the scholarship of this young boy at Harrow. The boy's progress was so fast in Greek under him that he said that Jones knew more Greek than did his teacher. Jones was almost on the point of spoiling his eyes by overreading, when as an indoor game he took to chess. His mother had a number of lawyer friends who were ultimately responsible for bringing Jones to the legal profession. Among those influences was Samuel Prime, who was a King's Serjeant in the Common Pleas.

There was a time when Jones was preparing for publication of his Greek and Latin compositions including a comedy in Greek under the title "Mormo" which was written in the measures of Aristophanes. Among his good friends who dissuaded him from premature appearance in print was famous John Parnell, later Irish Chancellor of the Exchequer to whom he had given a collection of his poems.

At Oxford Jones found himself head and shoulders above other students. He found the students at Oxford disappointing. He did not like "town and gown" fights, nor did he like the riotous evenings in taverns or coffee houses which was not his idea of a university education.

He found the Oxford lectures impressive but he had the feeling that they were a rehash of what he had already known. But then both Harrow and Oxford gave him the rich reward of good friendships. He had close friends in some of the most eminent young students and teachers of the time. They had formed a Club called the the "Grecian", in which informal dinners were held in members' rooms and distinguished literary subjects were debated. Among the great members of this Club were Thomas Day, Robert Chambers, John Paradise, William Warburton Lytton and Richard Paul Jodrell.

During his Oxford vacations Jones met Mirza, a Syrian, who was his main inspiration for learning Arabic. His studies of Hebrew, Arabic, Persian and Turkish were great and he came to be regarded as an Oriental-language scholar. He came to be known as the "Great Scholar" or the "Oriental Jones".

But a strange destiny was preparing Jones for India. In 1783 he was appointed a puisne Judge in the Bengal Supreme Court. He was a puisne Judge of that great Court for 11 years from 1783 to 1794. It was during this period that Sir William Jones reached heights of international fame and reputation as a scholar and profound Indologist. In the year 1783 he was knighted and he married Anna Maria Shipley. Between 1783 and 1792 he delivered his six celebrated charges to the Calcutta grand jury. The most outstanding achievement of Sir William Jones was the founding of the Asiatic Society of Bengal in 1784 which was the first institution of its kind devoted to scholarship, Indological studies and understanding between the East and the West in the intellectual and cultural levels independently of the politics of colonialism, imperialism and racialism. It provided the gateway of knowledge. It put India, her languages, literature, scriptures, religion and philosophy on the map of the world of knowledge. His ten anniversary discourses before

the Asiatic Society from 1784 to 1793 reveal his deepest love and the most profound and scholarly interest for India, her culture, her philosophy and her civilisation.

His judicial career is marked in 1784 by his quarrel with Burke over Hastings when Burke discarded Jones's "Best Practicable System of Judicature for India", "The Enchanted Fruit" and "On Parent Knees". Not many of his generation understood the remarkable achievements of Sir William Jones in general linguistics, law, literature and orientalism. They show his prophetic belief in a humanistic exchange of material and cultural resources between the East and the West, when colonialism and mercantilism dominated European thinking. His proposed Indian judicial reforms mark his wisdom and scholarship and almost a prophetic vision of the shape of things to come. The students of law, Judges, Jurists and Scholars would do well to read his manuscript for judicial reforms to make law and justice real for this country and not an exotic system, not indigenous to the soil, foreign to the culture, tradition and social heritage of the country, but a law and justice as an integral and indigenous part of the sociology of the country which they are expected to serve. It will not be inappropriate to mention here that Sir William Jones started writing even as early as in 1794 an Indian Law Digest on the basis of what he called "The Ordinances of Manu", but which, alas, was left unfinished by his death on 27th April, 1794.

Sir William Jones started his study of Sanskrit in real earnestness in 1785. Within the period from 1784 to 1788 he composed nine poetic hymns to Hindu divinities. His poems created a new horizon for English poetry. He felt that the imageries of Hindu mythology would be used as a means of a great re-orientation of English language. His odes to goddesses Lakshmi and Bhavani are remarkable not only for their translation but also for the spirit and the lan-

guage in which it is written. In 1786 he also published his *Hotopadesa* of *Vishnusarmana*. His love for Persian continued and in 1788 he published in Persian "Laili Majnun". Many described him as "Persian Jones". Five years before his death and to be accurate, within the period from 1789 to 1794, he edited four volumes of *Asiatic Researches*, writing many scholarly essays on diverse subjects whose range and horizon added new dimensions to the world of scholarship. In 1789 he also wrote on *Gita-govinda* and *Shakuntala*. Incidentally, his monumental seventh anniversary discourse had for its subject the Chinese where he advanced his original theory. In one of his essays on Indian history written in 1788, Sir William Jones said, "The hypothesis, that government was first established, laws enacted, and agriculture encouraged in India by Rama about three thousand eight hundred years ago, agrees with the received account of Naoh's death, and the previous settlement of his immediate descendants."

To illustrate the limitless scholarship of Sir William Jones, a brief reference may be made to his two essays on botany composed in 1789, one dealing with "The Design of a Treatise on the Plants of India" which was his first attempt to name each Indian plant in Roman and Arabic characters, with a concise and accurate classification and description of each and with proved uses of each in medicine, diet and handicraft. In his equally well-known essay on "On the Antiquity of the Indian Zodiac" written in 1789, he attacked the theory of the French mathematician Jean Montucla that the Indian zodiac was borrowed from the Greeks or Arabs. Again to take another illustration, he wrote on the subject of "On the Musical Modes of the Hindus" in 1789 as the first western publication on Hindu music and it was a remarkable product of Sanskrit research which was the first original comparison between Hindu and Western music and other arts for the development of mutual appreciation of them.

By the end of 1792 his fame as a Sanskrit scholar had eclipsed all the rest of his many accomplishments. After the publication of *Shakuntala*, his reputation was international. In 1782 the *Gentleman's Magazine* described him in these terms:—"His very early acquirements in elegant literature, as his Latin Commentary on the Asiatic poetry evincés, his uncommon facility of learning languages, the richness of his fancy, and the copiousness of his diction, render him one of the most extraordinary characters which England has furnished."

In 1791 Lord Cornwallis approved Jonathan Duncan's suggestion for the establishment of a Sanskrit College at Benaras, thus promoting the sense of national culture and India's dignity in ancient language and literature, all of which Jones had done so much to foster. In one field, however, Jones was a disappointed man. He wanted to make many worthwhile judicial reforms. Cornwallis had given support to Jones's Digest although this support was not to help Jones in his great reforms but to keep him out of the way through absorption with the digest. Cornwallis was afraid of Sir William Jones although he was an improvement over Macpherson. Sir William Jones viewed with alarm the Governor-General's plans for reforming the administration. His alarm was caused by his distrust of the possible executive encroachment upon the great legal institutions like the Supreme Court. Cornwallis established circuits inspite of Jones's objections based on personal experience and which he had expressed strongly in his "Best Practicable System of Judicature for India". Sir William Jones was happy when Shore arrived to take over the Governor-Generalship, but while Shore waited impatiently, Cornwallis got the approval of the Supreme Council to his long series of regulations covering the entire field of administration which affected the commercial system, land revenue, police and civil and criminal justice.

The background was strangely uncongenial.

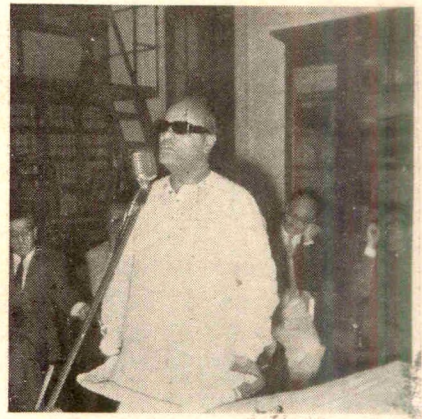
Cornwallis was the cause of despair of Sir William Jones. The American Revolution of the time, the Reign of Terror after the guillotine of Louis XVI in France making the cause of liberty uncertain, Great Britain's involvement in a war with France and the colonial policy in the West Indies provided a strange shadow over the work of Sir William Jones who never had a proper international or British or even British Indian administrative climate for accomplishing his humanistic plans for human rights and justice. In 1794 a bitter war was raging on the Continent, with France against Austria, Prussia, Holland and England. His dedication to judicial duties and his attempted help to the Indian people for a just British rule and proper humanistic relations between the East and the West had finally cost him his health.

On the night of April 20, the overwork and the Indian climate began to take their final toll. He was visiting Shore, whose estate adjoined Garden Reach. He told Shore that he had stayed out in the night air too long, he had not been strong since his acute rheumatism and that he would take some medicine on his return home, but he had to call his doctor. Everything possible was done for Jones. On 27th April, Jones's servant ran to Shore and told him that his master was delirious and as Shore arrived at Garden Reach, another servant came running out and told him that Jones had asked for a cup of tea, drank it and died. Sir William Jones died on 27th April, 1794, his digest of laws still unfinished in his library. The contribution of this Englishman to the East has been in a sense matchless. In sacrificing his life to monumental projects designed to help the British to understand India more justly, he was laying down a standard which has not been reached since. To secure a fair rule for the Indian people, he pledged his life to know the Indian sub-continent, its customs and laws. His spectacular example of scholarship and humanitarianism has always been praised but hardly followed. His far-

Speaking to us



Our Principal Dr. B. N. Mukherjee
addressing the Inter University
Asutosh Memorial Debate
Competition organised by
our College Union.



Mr. Sadhan Gupta M. L. A.
speaking at our symposium.



Hon'ble Mr. Justice P. K. Banerjee addressing
the freshers.



Mr. S. Acharya deliberating
his speech at the symposium.

Our Stars



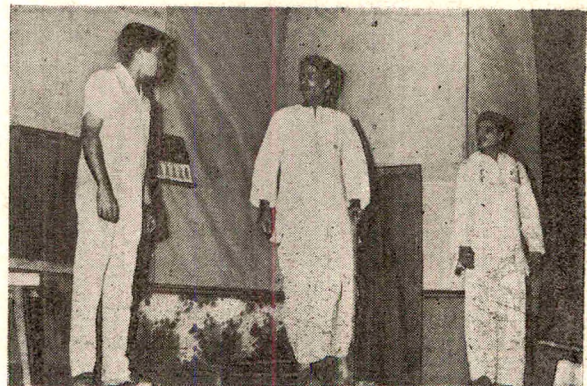
Participants of the English drama with
director Sujoy Srimal.



Participants of the Bengali
drama (Female)



Participants of the Bengali
drama (Male).



A scene from the Hindi drama.

sighted genius saw the way to a responsible world of humanism and human equality. King, George III, North and Thurlow were holding him back from the judgeship when he might have been appointed soon enough to work with Hastings. Politics thwarted him in domestic governmental policies, a worthy Indian bill, proper treatment of the American Colonies and even his attempt for an Oxford seat in the House of Commons. Burke and then Pitt did not heed him on Indian legislation. In Bengal, there were

the obstacles of Macpherson and Cornwallis in the executive administration, and Chambers and Hyde in the judicial administration. His enemies are forgotten today, while the imperishable contributions of Sir William Jones stand out in silent and majestic glory, a permanent testimony to the spirit of man. The world may have yet to learn the universal spirit and philosophy of Sir William Jones, a man of both the East and the West.

The Doctrine of Natural Justice and the Universities.

By

Dr. Satyendranath Sen, M.A., Ph.D.
Vice-Chancellor, Calcutta University

The Universities in India are all statutory bodies, established for the purpose of advancement of learning. To achieve this primary objective, they have to set up colleges and other institutions or to affiliate to themselves colleges and institutions set up by other organisations, prescribe different courses of study and syllabi for the students and conduct examinations leading to different degrees and diplomas awarded by them. These are all more or less routine but nonetheless very important functions of a University. In addition, each university must promote research and actively encourage the pursuit of the conquest of new territories in the uncharted ocean of knowledge and to be important centres of wisdom and culture. These are broadly the functions of a university and in the discharge of these duties, specially those mentioned at the beginning, the universities have to perform a number of quasi-judicial functions, such as the occasional punishment of a few wayward students and examinees. As in the case of other statutory bodies, the discharge of these quasi-judicial functions brings the universities within the jurisdiction of the courts, specially in relation to the observance of the principles of natural justice by the universities. The courts which are the guardians of the rule of law have naturally to ensure that, when any decision of the university leads to the curtailment of rights of any student, the university will have to observe the rules of natural justice laid down in various judicial decisions. As a principle,

this is unexceptionable. The universities, like the judiciary, must observe the due processes of law in all its functions if they are to command their due share of respect and authority among the students and the community at large.

All this is simple enough. But one should in this connection bear in mind Poet Hafiz's observation on love at first sight. That, he is stated to have observed, looks simple enough and appears adorable to all. But troubles start befalling as one advances a little into that blissful state. While the contents and the limits of the principles of natural justice have not yet been fully defined in relation to other statutory bodies, the attempt of the courts to apply it to the case of the universities as if they are like any other statutory body has inevitably given rise to some difficulties as a result of which the universities may have to give up one of their important statutory functions. As a typical instance, let us take the case of an examination offence which has of late tended to become widespread,—a student or large numbers of students committing the offence of copying at the examination halls. The practice which this university has been following in dealing with such offences has been adopted after a long experience of such cases inspired by the obvious desire to be as fair as possible to the offending candidates. When the university receives a report against a particular student from the authorities in charge of the examination centres along with the necessary supporting papers, it

issues a charge-sheet to the candidate, stating the offence of which he/she is being charged. The candidate is then asked to appear before the Board of Discipline, a high-powered Committee consisting of a high official of the University and some members selected from among the senior Principals of the affiliated colleges and senior teachers of the University and the colleges. The Board of Discipline established under the Ordinances of the University are authorised to set up a number of sub-committees for the speedy hearing of such cases. The accused student is asked to appear before one of these sub-committees when he submits his own reply to the charges and the members, who are all teachers, examine him in detail to find out the validity of the charge or charges against him or her. Then after a careful examination of all relevant documents including the statement made by the candidate, the sub-committee submits its recommendation to the parent Board of Discipline which, after another review of the statements and the recommendation, make its own submission to the Syndicate of the University, which is the final authority in all such cases.

This procedure, as has been stated above, has been evolved after a considerable experience of such cases and the presence of senior teachers in the various sub-committees and the Board is to ensure that the utmost fairness is shown to the students. The two basic principles of natural justice,—that the judges should be impartial and without bias, and that they must hear both sides in the case,—have been only observed in this procedure. Of course this does not fully satisfy all extended interpretations of the principle of natural justice such as the right to confront or cross-examine witnesses. This is a matter which requires very careful consideration before we can include it into the regular procedure. As every one is aware, it is becoming almost impossible to hold the university examinations on account of the violence committed by a section of examinees. Many teachers of the colleges, and of the universities have been threatened with

assault and even actually assaulted in a number of cases for the fact that they have tried to catch those examinees who made attempts to copy during the examination. As a result, teachers in large number of colleges are refusing to act as invigilators during the examinations. The danger of assault would increase still further if the invigilators who have submitted reports against particular candidates are required to appear before the Board along with the offending students. There is every possibility that the teachers will either refuse to act as invigilators, or refuse to report against offending students. That will mean that the examinations cannot be conducted or they will become a farce.

It is difficult to see why the non-incorporation of this particular principle in the procedure for the trial of examination offences should violate natural justice. The Supreme Court has already recognised the principle that the doctrine of natural justice need not always include the right to confront or cross-examine witness "when it is apprehended that witnesses would not be willing to come forward to give evidence in public by reason of apprehension on their part as regards the safety of their person or property". [*Gurbachan Vs. The State of Bombay* (1957) SCR 737]. The Supreme Court has even gone to the limit that the principle of natural justice need not necessarily involve a right to oral hearing. The right to defence may be admitted, but there is nothing to support the contention than an oral interview is Compulsory." The procedure laid down for the trial of examination offences includes the right to oral hearing, but does not, for obvious reasons, include the right to confront and cross-examine witnesses. The incorporation of this last rule will lead to the virtual breakdown of the examination systems. The concept of natural justice as applied to the universities must be an elastic one, and it should be the duty of the Courts to see in each case, having regard to the overall picture before them, whether a reasonable opportunity has been given to a person to show cause or not.

President's Relation With Cabinet

By

Prof. Indrajit Mandal, M.A., M.Com., LL.M.,

Since the introduction of the Indian Constitution a question of importance is, to what extent is the President under the Indian Constitution required in the discharge of his functions to act upon the advice of his Ministers?

In recent years the question has received more importance and attention. In 1967 at the time of election of the President, some of the opposition parties and leaders in their desire to canvass for Justice Subba Rao for the post propounded the concept of the discretionary, independent powers of the President under the Constitution and criticised the role of previous President who had been formal heads of state.

Uptil now both President and Prime Minister have belonged to Congress Party. People were not interested to know whether a particular power was exercised by the President or by the Prime Minister. But a situation may arise, if it has not already arisen, when the ruling Party at the Centre may have to accept a President chosen by the opposition if the latter's strength in Parliament and in State Assemblies and the personal popularity of a candidate contribute to his success. Indeed the people is interested to know what will be the relation between the President and the Cabinet in such situation.

Before 1967 Central Government and all State Governments were run by the Congress Party. In 1967 the fourth general election has created a

new political atmosphere in the country. One-party rule has been replaced by diversity of political aims and methods. This diversity will be a source of weakness of our country unless it is directed along the healthy channel of constructive effort. President is the Head of our Federal State. His primary task is to provide the necessary direction. Question naturally arises: Is the President bound to accept the advice of the Central Cabinet in his dealings with the States?

In 1969 in the wrangle over the Congress nomination for the Presidency, Prime Minister, Mrs. Indira Gandhi, used the argument that the next President should be a person acceptable to the Prime Minister. By this argument she focussed attention on a Constitutional possibility which has so long been utterly disregarded. This is the possibility of conflict between President and Prime Minister, over their respective powers and functions.

Under the Parliamentary system represented by England the Head of the executive (the Crown) is a mere titular head and the virtual executive power is exercised by the Cabinet who are responsible to the popular house of the legislature for their office and actions. Thus the British sovereign is bound by the advice of his ministers as is implied by the well-known doctrine that "the King can do no wrong". The Crown must act on the advice of the Cabinet and must not act on any other advice. This convention is enforced by the rule that every

public act of the Crown must bear the counter-signature of some Minister responsible to the Parliament.

In the Presidential form of Government of which the model is the United States of America, the President is the real head of the Executive, who is elected by the people for a fixed term. He is not responsible to the legislature. His Ministers are his Secretaries or Assistants. These Ministers are responsible to the President and not to the legislature. The advice of the Ministers is not binding on the President.

The relation between Indian President and his Council of Ministers is laid down in Articles 52, 53(1), 74 and 75 of our Constitution. Other provisions may be said to be subsidiary or ancillary to these provisions.

Art. 52: There shall be a President of India
Art. 53(1): The Executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

Art. 74: (1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions.

(2) The question whether any, and if so, what advice was rendered by Ministers to the President shall not be inquired into in any Court.

Art. 75 (1) The Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister.

(2) The Ministers shall hold office during the pleasure of the President.

(3) The Council of Ministers shall be collectively responsible to the House of the People.

In the Constitution we have a President who is elected by members of Parliament and of State Assemblies for a fixed term. The Executive power of the Union is vested in him. He can exercise these powers directly or through subordinate officers including Ministers. He appoints Prime Minister and other Ministers who hold office during the pleasure of the President. On the other hand we have Council of Ministers to aid and advise the President and they are responsible to the House of People.

Thus our Constitution is a combination of Parliamentary and Presidential forms of Government. President is given enormous powers in the Constitution. Ministers are given no power—their function is to aid and advise the President in the exercise of his functions.

Constitution nowhere says that the President is bound by the advice of the Cabinet. Absence of a clause laying down such obligation on the President leaves room for doubt and differences of opinion as to whether the President is bound by the advice of the Cabinet.

We find two contradictory views. According to one view: The advice of the Cabinet is binding on the President and he must act only on advice of Cabinet in all occasions. According to the second view: the advice of the Cabinet is not binding and the President has discretionary powers in the Constitution.

Briefly stated the case of the first view is that the Indian Constitution is closely modelled on that of Great Britain and that the intention of the makers of our Constitution is that the President of India, like the British Sovereign will be a mere titular head and will act according to the advice of his Council of Ministers, that the fountain of executive power in India is to be the Prime Minister and not the President there can be only one executive head in a State and not two; that Article 75(3) of our Constitution

makes Council of Ministers responsible to the House of the People, so the President cannot act contrary to the advice of the Cabinet, that the use of the words "aid and advise" in Art. 74 shall not stand in the way of establishing the principle of responsible Government in India as those words have led to the growth of responsible Government of British pattern in Canada, Australia and South Africa; that the President's oath under Article 60 to preserve, protect and defend the Constitution is a mere formality and his action contrary to the advice of the Cabinet will be tantamount to violation of the Constitution and will be liable to impeachment, that all the Presidents of India have accepted the position.

The above arguments have been challenged by the supporters of the second view. There are differences between English and Indian Constitution and the position of the Heads of these two States cannot be equal. On 28th November, 1960, while laying the foundation stone of the Indian Law Institute Building in New Delhi, the first President, Dr. Rajendra Prasad, pointed out a large number of differences between English Constitution and Indian Constitution. He was of opinion that the Indian President was not a mere formal head like the English King and that the powers and functions of the President of India differed from those of the British Crown.

The British Constitution is a unitary Constitution in which the Parliament is supreme, having no other authority sharing its power of legislation. Our Constitution is a federal Constitution in which the powers and functions of the Union Parliament and State legislatures are clearly defined and one cannot encroach upon powers reserved to the other.

The Head of State in the British Constitution is a monarch and Crown descends according to the rules of heredity. In India the Head of State is an elected President who holds office for a term and can be removed for misconduct by

impeachment.

British Constitution is an unwritten Constitution. Its conventions cannot be invoked and incorporated into our written Constitution.

British Parliament and Cabinet exhaust the whole of British polity, while our Union Government is only a part of the governance of the country.

British King is an undemocratic Institution and is above Law. Indian Presidency is a democratic Institution and is not above Law. He is liable to impeachment for misconduct.

Our conditions and problems are not at par with the British and it is not desirable and not possible for our President to occupy the same position in India as does the British King in England.

It is not true that the words "aid and advise" have led to the growth of responsible Government of British type in Canada, Australia and South Africa. Besides the expression, in Canada, there are the words "with a Constitution similar in principle to that of the United Kingdom" in the Preamble of the British North America Act (Canadian Constitution), which are not to be found in our Constitution. The words "aid and advise" do not entitle the Council of Ministers to claim any authority to guide the President. Because of these words the President cannot be replaced by Council of Ministers as head of State.

If we examine the different provisions of our Constitution we shall see that our President is not intended to be a mere figure head.

Article 53(1) of our Constitution empowers the President to exercise his power "directly" or through "subordinate officers" i.e. the Ministers. It is not true that President has no discretionary

power in the Constitution. This Article further requires the President to exercise his power "in accordance with this Constitution" i.e. not by principles of English Constitution.

Article 75(2) of our Constitution says that the Ministers shall hold office during the pleasure of the President. It would be ridiculous to suggest that a Minister could be dismissed only on his own advice. This must mean that the President can dismiss Ministers, though there is no such advice from the Cabinet or there is contrary advice.

Article 78(b) empowers the President of India to call for any information regarding the affairs of the Union Government from the Prime Minister. If we follow British principle we should say that President can send for any information from the Prime Minister only on advice of the Prime Minister. But it looks anomalous. This Article clearly points out that the President should decide for himself on this point.

There is no provision in the Constitution to bind the President to act in accordance with the advice of his Council of Ministers. Instead of providing that the President shall act only on the counter-signature of a Minister responsible to Parliament, Article 77(2) of our Constitution provides that the President himself shall make rules as to the manner in which his orders and instruments shall be authenticated.

There are certain matters in which the advice of the Council of Ministers is not available or reliable. Then the President should act in his discretion. These matters are:

- (1) The appointment and dismissal of a Prime Minister who ceases to enjoy the leadership of his party.
- (2) Dismissal of a Ministry which has lost the confidence of Parliament.

(3) Dismissal of the House of the People which appears to the President to have lost the confidence of the people.

(4) In exercise of the powers as a supreme Commander in an Emergency where the Ministry has failed to defend the country.

(5) Consultation with the Supreme Court of India under Article 143 when there is a cleavage of opinion between him and the Council of Ministers on any question of law or fact.

(6) Giving or withholding of assent to a bill.

It is not true that all the Presidents have acted as figurehead. There was the well known conflict over the Hindu Code Bill between President Rajendra Prasad and his Cabinet. Dr. Rajendra Prasad threatened to address the Parliament against the Hindu Code Bill. He wrote a letter of protest to Pandit Nehru. Implied in the protest was the threat of the President withholding his assent. Rajendra Prasad yielded because he did not find sufficient supporters.

Dr. Rajendra Prasad in exercising his powers under Article 72 i.e. in granting pardons etc., did not act on the advice of his Home Minister. President Rajendra Prasad himself looked into mercy petitions and the Home Ministry simply forwarded these cases and abided by his decision without question or delay. (Assam Tribune: 7. 4. 63).

It is wrong to presume that the Indian President is merely a ceremonial head. The country looks to him to protect the Fundamental rights. He is guardian of our Constitution. He is Head of Federal State and will be an arbiter when Union Government and State Governments are contending parties.

Thus we find two theories on the question:

According to this one: President is a titular head and Prime Minister is the real head and according to the others the President is not a mere figurehead, he can exercise his powers disregarding Cabinet's advice.

In my opinion our Constitution gives parallel powers to these two authorities:—President and Prime Minister. It is expected that they will work together. It is not inevitable that such powers would clash.

Thus the principle of checks and balances in the relation of President and Prime Minister is implicitly introduced in our Constitution. Whenever the leader of the Parliamentary majority ceases to represent the views of the majority of

the people in the country, the President as the symbol of the unity of the State would protect the interests of the nation. Likewise the Prime Minister as the elected head of the Government has the responsibility to safeguard the rights and freedoms of the masses against the tyrannical interference of the reactionary President. If both the President and the Prime Minister forget the national interest—the entire Constitutional machinery will break down, consequences will be the rise of a popular revolt. It would be defeatism to take the view that in our country men would not be available to work these powers smoothly and in the best interests of the people and without producing friction. Let us hope and pray that the future incumbent of these posts are not lacking in this quality.

Dangers of Disobedience

By

Asoke Chandra Sen, L.L.M., (Retired Judge),
High Court, Calcutta.

In the beginning of the present century, when India was under British rule, we used to think in terms of boycott, non-co-operation and civil disobedience. In order to suppress our struggle for freedom, repressive laws were passed by our foreign rulers. Our national leaders made fervent appeal to the people of India, especially the younger generation, not to submit to such laws, not to be cowed down by them, to court imprisonment by defying and disobeying them. We were asked to non-co-operate with our foreign rulers at every step, to create difficulties for them, to make it impossible for them to run the administration, to boycott the educational institutions and courts of law. The policy of non-co-operation was succeeded by the doctrine of civil disobedience. We were encouraged by our leaders to disobey the law imposed by our foreign rulers, to court imprisonment by reading in public proscribed literature, to deliver seditious speeches in open meeting and to prepare illegally salt out of seawater. Our object was to paralyse the Government by making it extremely difficult to execute the law, especially that part of the law which was meant for crushing the struggle for freedom. Attempt was made to disrupt railway communication and the postal services. Meetings were held disregarding the prohibitory order under section 144 of the Code of Criminal Procedure. Disobedience to the administrative

authority was regarded as a virtue and those who disobeyed the repressive laws, were given hero's welcome.

Even after the attainment of independence, there are many who think that our independence is sham and illusory. They are encouraging disobedience and lawlessness for the attainment of what they think to be real independence. The question is whether there is any scope for widespread disobedience to the established authority in a democratic republic based on adult franchise. Whatever change is thought necessary can be brought about peacefully by constitutional means through the ballot box. Present laws have been framed or approved by the representatives of the people. Our aim is to establish an enlightened welfare state. Various problems are crying for solution. Illiteracy must be removed, by introducing free primary education to all children above the age of seven. Our country is economically backward. Vast majority of people are poor, they live in unhealthy surroundings, they are scantily clothed and their houses are worse than hovels. Per capita production is low and unemployment is increasing by leaps and bounds. We are not yet self-sufficient in food. We are compelled to import not only finished products but also food-stuff. Two wars, even

though of short duration, one with China and the other with Pakistan, show how insecure are our borders and how vulnerable is the main land. If we are to remove illiteracy, banish poverty, solve unemployment, increase our industrial potential and strengthen our defence we must work in a concerted manner with grim determination forgetting all our differences, political, religious or ideological. We must be prepared to act according to the mandate of our constitution and according to the laws duly framed. When the task before us is so stupendous, it is suicidal to encourage disobedience to the mandate of the popular government. Our primary duty is to produce; no useful purpose will be served by giving undue emphasis on distribution when the only thing to be distributed is poverty. Our object is to point out the dangers of disobedience in the present condition of our country in the light of certain well-recognised political and economic principles.

Our constitution is based on the solemn resolution of the people to constitute India into a sovereign democratic republic. The sum total of the powers vested in the different organs of the state by the constitution may for all practical purposes be regarded as the sovereign. The very concept of sovereignty is based on obedience. The sovereign is the body of persons to whom the bulk of the people renders habitual obedience. If the authorities under the constitution are habitually disobeyed, the sovereignty of India will be irreparably shattered.

In a democratic republic the people undoubtedly are the political sovereign, but the legal sovereignty vests in the Constitution, that is to say, in the body of persons who constitute the executive, the legislature and the judiciary. They must perform their duties in their respective spheres according to the principles laid down by the Constitution.

We cannot say that our constitution is perfect.

It is the result of a long process of evolution. The framers of the constitution could not write on a clean slate, they could not altogether brush aside the legacy of the past. They had to make concession to certain relics of the past; hence all privileges and vested interests could not be swept away over night. It became necessary to make adjustment between conflicting interests. When all is said against the Constitution it can not be gainsaid that the its framers made the best of a bad bargain. The Constitution has largely succeeded in establishing a democratic republic. It is based on universal adult franchise which is the strongest bulwark of democracy. It contains within itself the seeds of future progress. The directive principles, though not justiciable, holds out a lofty ideal. It would be sheer foolishness on our part not to give a fair trial to our constitution.

For its successful working what is needed is willing obedience to its mandates. The consequence of disobedience is bound to be disastrous. No constitution can function properly in the absence of proper understanding as between the different organs of the state—the executive, the legislature and the judiciary. One must not try to usurp the function of the other, each must be ready and willing to perform its duties and assist the others. It is the duty of the executive to give effect to the laws enacted by the legislature. It is also the duty of the executive to assist the judiciary in enforcing its decrees and orders. If the executive refuses to co-operate, if it fails or neglects to give proper aid and assistance either to the legislature or to the judiciary, there will be complete deadlock. In a Federal Constitution the judiciary enjoys the privilege of deciding whether any enactment of the legislature is valid or void. If this power is abused, the legislature may be paralysed. The executive may also be rendered helpless by the legislature withholding assent to the demand for money. If the different functionaries quarrel amongst themselves, there will be chaos,

disorder and complete breakdown of the constitutional machinery.

In the case of a private individual he may be punished for his recalcitrance. But who is going to punish the judiciary or the executive or the legislature if it proves recalcitrant? What is the sanction behind the provisions of the Constitution? It is the good sense of those who are in charge of different branches of the Government that is the real sanction behind Constitutional law. This good sense requires strict adherence to all its requirements. Unless the game is played according to the rules the game itself will be spoiled.

In a Federal Constitution like ours it is not enough that there should be harmonious relation between the different branches of the government, the relation between the centre and the unit too should be amicable. If the states defy the centre that will give rise to serious complications. If the centre and the units pull in different directions the country as a whole will suffer. The centre depends to a large extent on the units; it will not be able to discharge its duties if they refuse to co-operate with it. Matters entrusted to the centre concern all the units. If those matters are neglected, if they are not properly done, the units will necessarily suffer. Groupism among the units is likely to lead to civil war causing serious distress to the country as a whole. The Civil War in America in the sixties of the last century was the result of friction between the northern and the southern States. It is the genius of Abraham Lincoln that saved the situation and prevented disruption and disintegration of the country. The southern States wanted to secede and they were not prepared to obey the mandates of the Constitution. If their attempt succeeded the country would have been split up into two parts with the possibility of further disintegration. North America in that case would have been a backward as South America.

The smooth functioning of the Constitution depends not only upon co-ordination between the different organs of the state and in a federation between the centre and the units, but also upon the attitude of the citizens of the state. In a democratic republic the government is ultimately responsible to the electorate. Democracy is government of the people for the people and by the people. Every form of government is government of the people and for the people. That is true even in the case of monarchy or autocracy or dictatorship. What is exactly meant by the expression 'by the people'? In monarchy or dictatorship we know who governs. The entire power is concentrated in the hands of the monarch or the dictator. Power tends to corrupt and absolute power corrupts absolutely. In a democracy political power lies with the people, to be more precise, with those who are entitled to vote. The success of democracy largely depends on a fair and honest election. If the voters do not exercise their votes in a proper manner, if they are swayed by corrupt practices, the election is reduced to a farce, and democracy becomes a mockery. Here too the spirit of obedience is of paramount importance. The voters must scrupulously obey the rules of conduct enjoined by the Representation of the Peoples Act. They must not allow themselves to be bribed or otherwise won over. It is the duty of every citizen to see that voting is free and fair. If votes are cast either out of fear or out of greed, political power will pass into the hands of bullies or plutocrats. They will not be able to command the respect of the people. The Laws framed by them are bound to be unjust. The quality of the executive is bound to suffer, especially where it is represented by a cabinet formed by the party in power.

The purity of the election is the sine qua non of democracy, and this purity cannot be maintained if the electors do not abide by the rules of conduct enjoined upon them by the law relating to the representation of the people and by

convention. Apathy of the electors is another source of danger. Only those who refuse to obey the tenets of democracy refrain from exercising their franchise:

Let us now consider the consequences of disregarding the rules of law in our daily life. The primary function of law is to uphold justice, that is to say, to give every man his due. There are conflicting interests in society that call for proper adjustment. Law has been evolved in order to put an end to the intolerable situation wherein might is right. Certain rights are recognised as indispensable for the progress of society and for the development of the individual so that he may realise his best self. The aim of law is to secure these rights. For example, every individual has the right to move about freely and to associate with others. Laws have been framed to ensure freedom of movement and freedom of association. These rights cannot be properly enjoyed if law is flouted. The immediate sanction behind law may be fear of punishment but the ultimate sanction is the willingness of the people to obey the law. Happy is the country where most of the people obey the law out of conviction or as a matter of habit. Respect for law is after all a matter of tradition. A community in which this tradition is deeprooted enjoys the benefits of culture and civilisation. A country torn by internecine quarrel and bloody feud can never enjoy the fruits of enlightenment. The inhabitants may be daring, audacious and reckless but they can not realise their best self, nor can they make any moral or material progress, because they constantly live in an atmosphere of violence.

The members of a state follow different pursuits; their interests are not always identical; in many cases they are conflicting. A certain measure may be good for the agriculturists, but it may be detrimental to the interests of manufacturers. A railway embankment facilitates transport to the great advantage of trade and

commerce; but it may cause damage to the crop by interfering with the free passage of rain water. A labour welfare scheme may adversely affect the consumers by increasing the price of the finished commodities. Cities may be developed at the cost of the villages. Too much emphasis on primary education may hamper the cause of scientific research and higher studies. The trade unions may extort advantages to the detriment of unorganised labour. Industries may develop as a result of protection given to them, but the consumers are bound to suffer. The rate of tax may be increased to collect funds for the welfare of those who are in the lower income group, but that is likely to affect the formation and accumulation of capital and thereby retard industrial development. The object of law is to maintain a balance as between the different economic, cultural and religious groups. It indicates the limit within which each group must function so that it may not intrude upon the sphere of another group. It ensures the harmonious development of all the groups so that they make their respective contributions to the progress and development of the community as a whole. Just as an architect puts together different materials according to plan for the creation of the magnificent edifice, law also brings together the various elements in the community to build up a magnificent nation that can greatly help the cause of humanity. If all the countries of the world are fully developed economically as well as culturally, they may meet together as equal partners in a world community where the horrors of war will be a thing of the past.

If we bear in mind that the function of law is social engineering, there will be no difficulty in realising the importance of law in the development of society.

The greatness of ancient Rome was to a large extent the outcome of their enlightened legal system. At a relatively early stage the Romans made a great advance in the sphere of law as

compared with other ancient peoples. In the history of legal conceptions the Roman Law occupies a position of unique value. The **jurisconsults** of Rome were held in great esteem by the common people as well as by the Emperors of Rome. The more eminent jurisconsults, as members of the Emperor's Privy Council, contributed materially to the shaping of Imperial legislation. The Emperors not only enforced the law evolved by the jurists, they themselves recognised the supremacy of the law. The Roman order was inseparably linked up with law. So long as the Roman society was based on law and order its power and influence was irresistible. The decline and downfall of Rome started with the disintegration of its social and political order established by law. The Romans courted disasters by refusing to obey the legal principles enunciated by the ancient law-givers.

In modern times it is the English who realised the importance of law in the life of a nation. Law-abidingness is woven into the very texture of the English Society. It is the East India Company that laid the foundation of the British Empire in India. But the Directors and servants of the Company ungrudgingly submitted to the various India Acts passed by Parliament from time to time to regulate affairs of the Company and curtail its powers. After the Mutiny the Company surrendered all its powers to the Queen of England without any protest.

Even today the English people cling to the doctrine of the Rule of Law. The tyranny of the executive is least felt there because of the prevalence of the doctrine. It implies that all men are equal in the eye of law and that the arm of law is long enough to reach even the highest dignitaries of the land. No distinction is made between a private citizen and an official. The acts of the officials in carrying out the directions of the executive are cognizable by the ordinary courts and judged by the ordinary law. No one can be punished except for a breach of the ordinary law. There must be a proper trial in

the ordinary court. There is total absence of arbitrary power. Laws are announced in advance and the officials and executive heads instead of acting arbitrarily must act according to preordained rules. The rights usually known as fundamental rights, namely freedom of movement, freedom of speech and freedom of association, are rooted in the ordinary law of the land. As the rule of law prevails no special constitutional guarantees are required for the preservation of the fundamental rights.

The sovereignty of Parliament and the rule of law are the two pillars of democracy and individual liberty in Great Britain. Benefits of the rule of law can never be enjoyed by those who take peculiar delight in disobeying the law on the slightest excuse. An independent judiciary is the custodian of the rule of law. The judiciary in a sense is the weakest of the three organs of the State, so far as physical force is concerned; it is the enlightened public opinion that sustains the judiciary and gives **sanctity** to its decisions. The reverence for the judiciary is the measure of a country's capacity for attaining moral and material prosperity. The prestige and power of the judiciary suffers in an atmosphere of lawlessness.

It is difficult to maintain the rule of law if the laws are inequitable and tyrannical. But in an enlightened democracy law adapts itself to changing social environments. Laws are modified from time to time by public opinion. In a democracy there is freedom of discussion and public opinion becomes more and more enlightened as a result of free discussion. Gradual changes brought about by legislation backed by public opinion are much more effective and enduring than the changes brought about by physical force. Evolution is the nature's own process and the development of mankind from primitive barbarism is the result of a long process of evolution and not of sudden eruptions. Evolutionary forces can assert themselves only

in an well regulated society where people are law-abiding and disciplined. Impatience and lawlessness constantly retard the progress of society.

There was a violent upheaval in France as a result of the French Revolution. The liquidation of the feudal system was undoubtedly hastened by this revolution. Scientific development and the new method of production could have put an end to feudalism even without revolution as in England. We are not sure to what extent the spirit of lawlessness let loose by the Revolution retarded the economic growth of France. England relied on the evolutionary process and thereby went ahead of France. The people of France revolted against the landed aristocracy to be engulfed by the greater tyranny of a dictator. However, they became disciplined under the dictatorship and learnt the virtue of obedience. The subsequent progress of France was brought about gradually by a process of evolution.

Hitler rose to power by flouting the Constitution of Germany. His rise to power was meteoric; his fall too was equally precipitous. He himself defied the law but imposed iron discipline for plunging Germany in a ruinous war. Germany had to pay dearly for disobeying the Constitution and denying the treaty obligations.

The southern states of the United States of America by defying the Constitution, by demanding the right of secession, by insisting upon their unjust right to exploit slave labour brought the whole country on the brink of a disorder. It is the genius of Abraham Lincoln that saved the situation. With the cessation of hostility he lost no time in establishing the rule of law. The enlightened policy of Lincoln paved the way for the future greatness of America. The Americans realised the dangers of disobedience, and since the termination of the civil war they have paid unquestioned obedience to the constitution. The federal judiciary in America occupies a unique position. The national

integrity of America has been greatly strengthened by the supremacy of the judiciary.

In a developing country like India the consequences of disobedience will prove disastrous. Trade, Commerce and industry cannot flourish in an atmosphere of lawlessness. The law of contract plays an important part in the sphere of trade and commerce. By means of contract private individuals create law for themselves. If contracts are honoured more in the breach than in observance buying and selling will come to a stand still, and production of goods will be on the wane. If there is mutual distrust between the employer and the employee it will be impossible to solve the problem of unemployment. India must be made self-sufficient in the matter of food supply. Population of India is fast increasing. If food production is to keep pace with population, the method of cultivation has got to be changed. A large amount of capital must be invested in land to provide facilities for manuring, improved seeds and irrigation. No body will be willing to invest capital in land unless he is sure of getting adequate return for the capital invested. If people become impatient, if they are averse to steady and patient work, if they forcibly reap the crop raised by others many of the fields will remain uncultivated and total agricultural production will go down. One may forcibly occupy the land of another, but he may not have the necessary means to bring it under cultivation. Co-operative cultivation may go a great way in enabling even people of moderate means to enjoy the benefits of scientific cultivation by investing capital in land. They can pool their resources through co-operatives to raise the necessary funds. But co-operation requires utmost good faith and a spirit of mutual accommodation. The members of a co-operative society must abide by the bye-laws in order to make it a success.

In the sphere of industry the relation between labour and capital now a days is mostly regula-

ted by law. If the law unduly favours the employer as against the employee, every effort should be made to modify the law. In a Constitutional democracy based on adult franchise it is not at all difficult to mobilise public opinion in favour of the workers. But as long as the law is not changed, the existing law must be complied with, otherwise growth of industry will be greatly retarded. Development of industry is required not only for producing enough, but to provide employment to the vast army of the unemployed. If it is felt that the private sector is guilty of exploiting the workers the major industries may be nationalised. If the leading banks of the country can be nationalised over night, there is no reason why the important industrial concerns cannot be nationalised. But nationalisation is no guarantee for progress, unless the Government can get hold of honest and efficient officers or managers to manage the nationalised concerns. The workers in such concerns may be worse off than their compatriots in the private sector. From the point of view of production and the welfare of the workers it is immaterial whether a concern appertain to the public or the private sector. The thing that is of paramount importance, is industrial peace, which alone can ensure progress and prosperity. Poverty is the most baffling problem of India. People must be prepared to work silently and patiently with their back to the wall for several decades in a spirit of law-abidingness before they

can overcome the challenges of poverty. If energy is unnecessarily wasted in mutual recriminations and quarrels, if industrial peace is disturbed on various pretexts either by the employers or by the employees, if the land laws are disregarded at every step, at every turn by the land-holders or the cultivators, India will not be able to get out of the rut. If disobedience is encouraged, if discontent is fomented, if people are advised not to work to protest against their grievances, real or imaginary, India will be ruined, economically with disastrous political consequences. People must learn to obey the law of the land, must help the government to maintain law and order, must be willing to work on the field and in the factory, must refer all their disputes to the tribunals set up by the law of the land, must abide by the decision of these tribunals, must follow Constitutional means in changing the law that appears to be **inequities** or **outmoded**, must abjure violence and cultivate the spirit of co-operation in order that India may make steady progress, may be one of the developed countries of the world, may take a leading role in all establishments of a world order based on co-operation and mutual understanding and good will. Disobedience means death, obedience means salvation. If the legal order, the foundation of civilised living is disrupted by acts of violence life will be nasty, brutish and short-lived.

Directors' Remuneration And Perquisites Under The Companies ACT, 1956

By

Sreemanta Boral, 2nd year LL.B. Class

Directors' remuneration and managerial remuneration as a whole have been one of the most controversial aspects of the Company Law to-day ever since the present voluminous statute was enacted in 1956. In fact, there is in most cases a sort of tug-of-war between a company administration and the custodians of the Company Law viz. the Company Law Board about the quantum of remuneration payable to directors and other managerial personnel. Directors' remuneration forms a component part of managerial remuneration and is governed by the provisions of sections 309 to 311 of the Companies Act, 1956 read with Sections 198 to 200. Apart from managerial functions, a director may sometime render non-managerial services to a Company i.e. services in a special capacity as a technician, legal adviser or consultant. Thus, a director's remuneration drawn from a company may be for **managerial or non-managerial work**.

For the purpose of the present discussion **company directors** may be divided into certain distinct **categories** viz. managing directors, whole-time directors, part-time directors, technical or consultant directors, nominee directors and ordinary directors. Again, **remuneration** may be paid by a company to its directors under one or more of different **heads** like monthly salary, commission on profit, perquisites or benefits in kind, fees for attending meetings of the Board or Committees thereof. It would be interesting to discuss the provisions of the Companies Act, 1956 relating to the remuneration of different kinds of directors under these different heads.

Section 198 applies to a public Company, a

deemed public company under Section 43A and a private company which is a subsidiary of a public company, but does not apply to a private company as such. It deals with **overall or total managerial remuneration** payable by a company for managerial services to one or more of the four distinct categories of managerial personnel envisaged by the Companies Act viz. managing or whole-time directors, managing agents, secretaries and treasurers and managers. The effects of Sections 198 and 199 are summarised below:—

(i) The **maximum limit** for total managerial remuneration for a particular financial year is **11% of the net profit** of a company to be computed in the manner prescribed by Sections 349 to 351. Remuneration paid to directors, however, is not to be deducted for the purpose of ascertaining the net profit.

(ii) A **minimum limit** is also laid down at Rs. 50,000 payable in the event of inadequacy of profit in any year, **subject to approval of Central Government**, who are also empowered to sanction payment exceeding that sum, only where monthly payments are made to directors or managers.

(iii) For the purpose of arriving at the amount of total managerial remuneration **perquisites** categorised as follows must also be taken as part of the remuneration:—

- (a) rent-free accommodation or any other benefit or amenity in respect of accommodation free of charge ;

(b) any other benefit or amenity free of charge or at concessional rates including inter alia bonus, provident fund, car, medical aid, entertainment allowance etc.;

(c) life insurance, pension, annuity or gratuity for any managerial personnel or his spouse or child;

(d) any other expenditure for any obligation or services which, if not incurred by the company, would have been incurred by the persons concerned.

(iv) The overall limit of 11% is **exclusive of any fees payable** to directors for attending meetings of the Board of Directors or Committees thereof.

Section 200 prohibits any payment, free of tax, directly or indirectly, by a company to any officer or employee including directors and other managerial personnel.

Section 309, which does not apply to private companies (other than subsidiaries of public companies), provides that remuneration payable to directors shall be **determined either by the Articles or by a resolution or if the articles so require, by a special resolution** of the company **subject to the overall limit** prescribed by section 198 and the **separate limits** laid down by Section 309. Without such express authority no director can claim remuneration as a matter of right for acting as such. The Articles of Association, however, almost invariably provide for remuneration being paid to directors. In this connection a reference may be made to **clause 65 of Table A** which authorises inter alia payment to Directors of remuneration in pursuance of the Act

Assuming that the required authority is contained in the Articles or has been obtained by

means of a requisite resolution, the combined effects of Sections 198 to 200 and 309 to 311 of the Companies Act, 1956, so far as they relate to directors' remuneration, are enumerated hereunder.

Managing and Wholtime Directors:

(i) Remuneration cannot exceed 5% of the net profit, if there is one such director, and 10 per cent if more than one.

(ii) Within these limits, remuneration may be paid either on a **monthly** basis or by a specified **percentage of net profits** or partly by one way and partly by the other.

(iii) **Perquisites shall be included** in calculating the limits as above (except in case of travelling, hotel or other expenses, if any, properly incurred by directors in attending and returning from a meeting of the Board or a Committee thereof or a general meeting or in connection with a company's business, as provided by Clause 65 of Table A or as may be otherwise provided in the Articles.)

(iv) In the absence of other categories of managerial personnel than directors, the minimum total remuneration of Rs. 50,000 may be exceeded in case of salaried directors only and subject to approval of the Central Government.

(v) No commission or remuneration can be received from any subsidiary of the company.

Ordinary Directors:

Directors other than managing or wholtime directors who do not receive any payment on a monthly basis can be paid, on the strength of a special resolution, commission @ 1 per cent of the net profit, if the company has a managing or wholtime director, managing agent, secretaries and treasures, or manager and 3% of net profit in the absence of any such managerial personnel. A special resolution referred to above can

remain in force for not more than 5 years at a time. If there are more than one such ordinary director they will share the said 1% or 3% as the case may be in the proportion as may be decided by the Board. These percentages may, however, be increased by a company in general meeting with the approval of the Central Government.

Technical or Special Directors :

They are appointed for looking after the technical side of a company's business or for special purposes like legal advice etc. So long as they do not perform any managerial function and restrict their work for the company to the specialised jobs assigned to them any remuneration payable to them cannot strictly speaking be regarded as managerial remuneration and should, therefore, be excluded from the ceiling of 11% prescribed by Section 198. This position was confirmed by the Bombay High Court in the Jyoti Ltd. case in 1957. Sub-section 3 of section 309 was amended in 1960 bringing within the purview of the limits prescribed by this section remuneration payable to **any director who may be in the wholetime employment of a company in any capacity** including that of technical adviser. As, however, there was still some doubt and controversy on this point, Clause 43(i) of the Companies (Second Amendment) Bill, 1964 seeks to make it clear that directors' remuneration determined under Section 309 shall be inclusive of remuneration payable to a director for services rendered in any other capacity **except** where the services so rendered are of a **professional** nature and the Central Government are satisfied that the director has the requisite qualifications for the practice of the profession and that such practice is his **principal occupation**.

Part-time Directors :

As per sub-section 4 of section 309, part-time directors, if any, may be paid remuneration up

to 1% or 3% of the net profits, as the case may be, in the same manner as applicable to ordinary directors that has already been discussed.

The Company Law Board has been interpreting this section as prohibiting any **monthly payment to a part-time director**. This official interpretation was challenged before the company Law Advisory Commission on the ground that sub-section 4 of section 309 impliedly **provided for payment of monthly remuneration to part-time directors without sanction of the Central Government**. This contention was accepted by the Commission. Clause 43(ii) of the Companies (Second Amendment) Bill, 1964, however, seeks to end the said sub-section so as to specifically authorise payment of remuneration to part-time directors even on monthly basis but subject to approval of the Central Government.

Nominee or ex-officio Directors :

Directors nominated by managing agents, financial institutions, Government or others, if any, are not normally entitled to any remuneration on a monthly basis or by way of commission except that they may be paid remuneration subject to the limit of 1% or 3% of net profit as ordinary and/or part-time directors, under sub-section 4 of section 309.

Miscellaneous Provisions :

There are certain general matters, other than monthly remuneration or commission or perquisites, as applicable to all directors, which are enumerated below :—

- (a) Directors may be paid **fees** for attending Board or Committee meetings irrespective of their class or category at rates provided for in the Articles or authorised by a Company in general meeting, which are **exclusive of the maximum limit** fixed for directors' remuneration. Meeting fees cannot be

paid on a monthly basis. Section 309(2).

- (b) **No increase** in the remuneration of any director, directly or indirectly, is valid **unless approved by the Central Government**, for which application has to be made in Form 26, prescribed by the Companies (Central Government) Rules; this restriction does not, however, apply to a private company (Sections 310 and 311). Clause 44 of the Companies (Second Amendment) Bill, 1964 seeks to exempt from this restriction any increase in the rate of meeting fees upto to Rs. 100 after such increase.
- (c) Any **excess** amount received by director beyond the permissible limit must be held by him **in trust for the Company for eventual refund**; a company cannot waive such a refund on the part of a director without the approval of the Central Government [Section 309(5A) and 5(B)].
- (d) As per Table A, if applicable, monthly payment of remuneration is deemed to accrue from day to day. Accordingly a director shall be entitled to **proportionate payment for broken periods** of service as such [Clause 65(1)].
- (e) **No tax-free payment** can be made to a director (Section 200).

In this connection it may be mentioned here that the Central Government has reviewed its policy relating to the imposition of administrative ceilings within the statutory limits laid down by the Act on remuneration of managing/whole-time or part-time paid directors/managers in public limited companies in keeping with the overall socio-economic objectives of State

Policy.

The following revised guidelines have, accordingly, been framed for dealing with applications received by the Company Law Board under sections 269, 310, 311, 309(3) and 198, 387 and 388 and allied sections of the Indian Companies Act, 1956: which are extracted from the circular No. 2(19)-CL VIII/68 dated 11th. November 1969 from Government of India, Department of Company Affairs.

(i) The maximum remuneration, within the statutory limits laid down by the Act, payable to managing/whole-time or part-time paid director/manager in a public limited company has been fixed as under:

- (a) There will be a ceiling of Rs. 90,000 per annum i.e. Rs. 7,500 per month on salary including dearness allowance and all other fixed allowances.
- (b) A commission on net profits upto 1 per cent of the net profit may be allowed in addition to the salary as an incentive for efficient and sound management, but this should be subject to a maximum ceiling of 50 per cent of the approved salary i.e. an absolute ceiling of Rs. 45,000 per annum.
- (c) Where a company proposes to pay remuneration in the form of commission on net profits alone, this shall be subject to a maximum administrative limit of Rs. 1.35 lacs per annum.
- (d) At present there is no overall ceiling for the value of perquisites apart from limits on certain individual items like housing and medical benefits. In future, perquisites to be allowed in addition to salary and/or commission will be restricted to an overall limit of one-third of the salary/emolumens or

Rs. 30,000 per annum (Rs. 2,500 per month) whichever is less. Rs. 30,000 per annum only will thus be admissible to those having salary/emoluments of Rs. 90,000 per annum or above. Within this overall limit a company will be free to choose whatever perquisites it wants to allow. But this ceiling of one-third of salary will not include the employer's contribution to provident/superannuation fund to the extent these are not taxable under the Income-tax Act (the present position being that provident fund contribution not exceeding 10 per cent of the salary and superannuation fund contribution so long as it, together with the provident fund contribution, does not exceed 25 per cent of the salary are not taxable). Similarly, the reimbursement of medical expenses actually incurred subject to the present ceiling of Rs. 5,000 per annum or one month's salary whichever is less, and in the case of expatriate directors, passage benefits at reasonable intervals, say, once a year, will be excluded from the aforesaid ceiling on perquisites. Leave salary for leave admissible within 1/11 of duty periods will also not be counted for this purpose.

(ii) The above ceilings will be followed as a rule subject to exceptions in some deserving cases depending on the merits thereof, for example, where higher remunerations have already been drawn in public limited companies

or in the case of expatriate directors in Indian subsidiaries of foreign companies or in Indian companies having foreign collaboration arrangements provided the appointment is justified and the expatriate director concerned has previously been drawing higher emoluments.

(iii) In the interest of better corporate management, the Company Law Board will not ordinarily approve a person's appointment as Managing Director in two companies, which are both of a large size and where it is felt that the same person may not adequately discharge the responsibilities of the second charge. However, in cases where the two companies are small one or are engaged in more or less similar or allied business and/or are situated in the same area, the Board may, in the interests of efficient and more economical management of the two companies, approve a common managing director but in that event, the remuneration approved for the appointment in the second company will be regulated suitably.

As is the case at present, the appointment of a person who is already whole-time director in one company, will not be approved as a paid Director in another company.

(iv) The number of the managing/whole-time and part-time paid directors in any company will also have to be justified when new appointments as managing or whole-time directors or grant of remuneration to paid part-time Directors in the same company are sought. It will not be adequate justification for such proposals that the total managerial remuneration to be paid to all the directors in any case will be

within the statutory ceilings. Such proposals should be justified fully having regard to the size and functions of the company, and the responsibilities and duties to be assigned to the managing/whole-time or part-time paid directors and the proposals will be approved only if they are shown to be in the interests of the company and its shareholders.

This administrative ceiling is alleged to be the most drastic step of the Government to

reduce remuneration payable to the managerial personnel and the decision has been taken without consulting interests concerned.

But in view of the fact that the revised guidelines on administrative ceilings have been framed in keeping with the overall socio-economic objective of the state policy, it appears to be quite in fitness with the situation unless it proves to be a disincentive to the managerial efficiency.

The Principles Of Natural Justice

By

Sunil Kumar Mitra, M.A. LL.B.

Lecturer, University College of Law (on leave)

The principle of natural justice possibly owes its origin to the concept of natural law. According to Freedman, 'natural law is an ideal to which the positive law ought to conform.' Natural law is inspired by two ideas, namely, of an universal order governing all and of inalienable right of individuals. Natural law which is the mother of natural justice may be described in modest language, as general principles of law.

Natural justice may be briefly defined as certain fundamental rules of judicial procedure. Based upon the doctrine of the Rule of Law the principles of Natural Justice are briefly expressed in the following two Latin maxims :—

1. **Nemo debet esse iudex in propria causa**—"No one should be a Judge in his own cause", i.e. the Tribunal must be impartial.
2. **Audi Alteram Partem**—No man should be condemned unheard, i.e. both sides in case should be heard by the Judge.

Besides the above two maxims, judicial pronouncements have established another principle namely, that the trial should be held in good faith without bias and not arbitrarily or unreasonably.

As observed by the Supreme Court in 'A. K. Kraipak Vs. Union of India' AIR 1970, S.C. 150

"The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules, namely, (1) no one shall be a judge in his own case (*Nemo debet esse iudex propria causa*) and (2) no decision shall be given against a party without affording him a reasonable hearing (*Audi Alteram partem*). Very soon thereafter a third rule was envisaged and, that is, that quasi-judicial enquiries must be held in good fair without bias and not arbitrarily or unreasonably."

In the American Constitution, the principle of natural justice finds recognition in the 'due process Clause' which is to be found in the 5th and 14th Amendments of the American Constitution. The 5th Amendment of the American Constitution provides that no person shall be "deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation". The 14th Amendment of the American Constitution also provides that "nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of law."

Due process according to Prof. Willis includes both the substantive as well as the procedural aspect. In its substantive aspect, due process connotes the substantive reasonableness of the laws and in its procedural aspect, due process

consists of the following four factors :—

- (a) Fair and reasonable notice.
- (b) Opportunity of representation.
- (c) Orderly course of procedure, and
- (d) Impartial tribunal.

The principle of natural justice has been held to apply :—

1. To all judicial bodies and Courts of general or special jurisdiction, and
2. To all tribunals, statutory or otherwise, acting in a judicial or quasi-judicial capacity.

The principle of natural justice does not apply either to purely legislative act or to purely administrative or ministerial acts. 'It would be erroneous to import into the consideration of an administrative order the principle of natural justice.'

The difference between purely administrative acts and judicial acts is briefly stated as follows :—

"Administrative acts, orders or decisions are not dependent upon the evidence adduced, but if any authority which has to decide the right of the party, comes, to the decision only after taking evidence or hearing parties, it is said to act judicially". (P. B. Mukherjee J. in 'Nripendra Nath Banerjee Vs. Chief Secretary, West Bengal'—AIR 1961 Cal. I).

The following principles of judicial review have been laid down in respect of a domestic tribunal.

- (a) Rules under which tribunals work must be strictly complied with.
- (b) The test of natural justice, unless it is excluded by the rules, must be strictly

followed.

If these two rules are fulfilled, the Courts cannot sit in appeal over any order of a domestic tribunal.

As stated earlier, the two underlying canons of natural justice are :

1. Nemo debet esse judex in propria causa.

(No one should be a Judge in his own case).

2. Audi Alteram Partem.

(No man should be condemned without heard).

Impartial Tribunal :

1. Nemo debet esse judex in propria causa.

A Judge must decide a case impartially. Bias by interest which disqualifies a Judge falls into two broad cases :—

- (a) Where the Judge has a pecuniary interest in the subject matter of litigation.
- (b) Where from kindred or other cause, the Judge may have a bias in favour of one of the parties.

The two essential characteristics of an impartial tribunal are the following :—

- A. A Judge should have no interest legal, personal or financial in the subject matter. Bias is presumed if the Judge has such an interest.

In the words of Lord Hewart—"Justice should not only be done but should manifestly and undoubtedly be seen to be done."

- B. A Judge must be free from bias i.e. he must adjudicate with an open and independent mind, without any inclina-

tion in favour of one side in the disputes.

The test is whether there is in the mind of the litigant a reasonable apprehension that he would not get a fair trial.

The following examples of bias may be mentioned :—

- (a) Relationship of the Judge.
- (b) Personal friendship.
- (c) Professional or Employment Relationship.
- (d) Pecuniary or any other interest in the subject matter of the litigation.
- (e) The Judge acted as witness against any party.

“The law does not measure the amount of interest which a Judge possesses. If he has any legal interest in the decision of the question one way he is disqualified, no matter how small the interest may be” (Sergeant Vs. Date (1877) 12 QB. 558).

In explaining the reason behind the rule, it is also stated therein as follows—“the law in laying down this strict rule has regard not so much perhaps to the motives which might be supposed to bias the Judge as to the susceptibilities of the litigant parties.”

The Constitution of India has also made the following provisions :—

- (a) In case of preventive detention, the Advisory Board which will report as to the justification of detention beyond three months is to consist of persons fit to be appointed as High Court Judges. [Art. 22(4)(a)].
- (b) In case of members of the Civil Services of the Union or of a State

any order for dismissal or removal can be made only by persons who are not subordinate to the appointing authority.

It may also be mentioned in this connection that Section 556 of the Criminal Procedure Code 1898 provides as follows : “No Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party, or personally interested, and no Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself.”

2. Audi Alteram Partem.

This maxim embraces the following principles :—

- A. Reasonable notice.
- B. Reasonable opportunity of representation.
- C. Orderly course of procedure.

Briefly put a man must know the case he has to meet and he must have a reasonable opportunity of meeting the case.

The principle of Audi Alteram Partem, that is, “No person should be condemned unheard” is derived from the following principles :—

- (a) Due process Clause of the U.S.A.
- (b) Rule of Law of the U.K.

This is an elastic concept and depends upon the facts of each case.

A. Reasonable Notice :

The minimum requirements of notice are the following :—

- (a) The notice must be addressed to the party.
- (b) It must state the place of hearing and the time of hearing when the Judge proposes to proceed with the matter.

- (c) The charge or the show-cause notice must not be vague and must afford sufficient opportunity to the party affected. It must contain sufficient particulars.

A party must get reasonable notice of the case he has to meet, so that he may get reasonable opportunity to state his case. The following four factors should be borne in mind in deciding this principle:—

- (a) The onus to establish lack of notice is on the petitioner.
- (b) Adequacy of notice depends on the facts of each case.
- (c) If a notice of one charge is given, the party cannot be punished for a separate charge.
- (d) The principle does not apply in case of purely administrative act.

B. Reasonable opportunity for representation:

In the case of *Hagar Vs. Reclamation District*, (1884) 111 U.S. 701 due process was interpreted as follows:

"Whenever it is necessary for the protection of the parties it must give them an opportunity to be heard respecting the justness of the judgment sought".

As laid down in the case of *State of Punjab Vs. Karam Chand Jain* (A.I.R. 1959—Punjab 462) the following are the basis requirements of reasonable opportunity.

- (a) Every person must be given personal notice of charges he has to answer.
- (b) He must be informed of the place where and the time when he shall so answer.
- (c) He is given an opportunity, if he so

chooses to cross-examine witnesses produced against him.

- (d) He is given opportunity to produce evidence and witnesses to refute the charges, after all evidences against him are produced and known to him.

- (e) The decision of the Court or Tribunal must be governed by and based upon evidence at the hearing.

- (f) He is afforded an opportunity to make representation as to why the proposed punishments should not be inflicted.

- (g) The hearing had to be before an unbiased and unprejudiced officer. (*Khem Chand Vs. Union of India*—A.I.R. 1958—S.C. 300).

The minimum that a Court will insist upon is that there must be "a real and effective opportunity of meeting any relevant allegations made against him."

Judicial decisions have laid down the following additional principles:—

- (1) If the party does not avail of the opportunity of representation or chooses to be absent from the proceedings in spite of notice, then he cannot complain of failure of natural justice.
- (2) "Even when a statute does not contain any specific provision for notice or hearing, the principles of *Audi Alteram Partem* (No man should be condemned unheard) should be applied to proceedings before a Tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals" (*House of Lords (Lord Reid) in Ridge-vs-Baldwin*

and Anr. (1963) 2 A.E.R. 66 at Page 73-75).

- (3) Similarly the Supreme Court of India in State of Orissa-vs-Dr. (Miss) Binapani Dai AIR 1967 S.C. 1269 held as follows :

"The person against whom an enquiry is held must be informed of the case he is called upon to meet and the evidence is support thereof. The rule that a party to whose prejudice an order is intended to be passed is entitled to hearing applies alike to judicial Tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power."

C. Orderly Course of Procedure :

It is not necessary that the ordinary rule of evidence prevailing in a Court of Law should be applied.

The Supreme Court has laid down the following four rules of evidence (Union of India Vs. T. R. Varma, A.I.R. 1957—S.C. 882).

- (1) Every party should have opportunity of adducing all relevant evidence.
- (2) Evidence of the opponent is to be taken in his presence.
- (3) Every party should be given opportunity of cross-examining witnesses examined by the other party.
- (4) No material should be relied upon against him without giving him an opportunity of explaining them.

Recording of evidence and opportunity for

cross-examinations before a Tribunal need not strictly follow the Evidence Act or the procedure in a Court of Law. The following principles have been judicially recognised :—

- (a) There is no universal rule as to the kind of hearing required. 'It is sufficient if a case is heard in a judicial spirit in accordance with the principle of substantial justice.'
- (b) The right to make a written representation or to submit an explanation to the charges should be given. Natural justice does not however require that a personal hearing must always be given particularly when such oral hearing is not asked for, unless there is statutory provision therefor, e.g. Section 124 of the Customs Act, 1962, Rule 55 of the Civil Service (Classification, Control and Appeal) Rules, The Public Servants (Inquiries) Act, 1850 etc. When, however, such evidence is given, personal hearing should be given to explain the evidence. To quote the Supreme Court in Gopaland Vs. Madras (1950) S.C.R. 88 (124) and approved in T. C. Roy Vs. Collector of Customs (1957) S.C.A. 764—"I am not prepared to accept the contention that a right to be heard orally is an essential right of procedure even according to the rules of natural justice. The right to defence may be admitted but there is nothing to support the contention that an oral interview is compulsory."
- (c) Similarly no natural justice requires that there should be a kind of formal cross-examination. "Formal cross-examination is procedural justice. It is governed by rules of evidence. It is

- the creation of courts and not a part of natural justice but of legal and statutory justice" (P. B. Mukharji J. in *K. L. Agarwalla Vs. Collector, Land Customs* 69 C.W.A. 864 (817)).

- (d) There is no natural right to be represented by a lawyer unless the complication of the case or volume of evidence or important questions of law involved require it.

Natural justice under the Indian Constitution :

The principle of natural justice has also been accepted in the Constitution of India. Although the American doctrine of due process of law and judicial review has not been applied by the Courts in India, yet the Constitution of India enjoins upon the Supreme Court and the High Courts to declare any law passed by the Parliament or State Legislature as unconstitutional, if it takes away or abridges any of the fundamental rights guaranteed in Part III of the Constitution (Art. 13). The Supreme Court or the High Courts may also strike down laws on the ground of arbitrary discrimination (Art. 14), or on the ground of unreasonable restriction (Art. 19) and in case of deprivation of liberty, if the order of detention is in violation of the provisions of Art. 21 or Art. 22 of the Constitution.

In the case of '*Mukhtar Singh Vs. U.P.*' (AIR 1057 All 297) the Supreme Court held that the principles of natural justice could be worked in our country generally in the three following cases :—

- (a) When it is alleged that a certain person or class of persons have been unreasonably discriminated against, and that the law violates the provisions of Article

14 or that the restrictions imposed upon the freedom guaranteed under Article 19 are unreasonable.

- (b) When a rule or regulation or order made in the exercise of a statutory power is attacked on the ground that it is unreasonable.
- (c) When the procedure adopted by the judicial or quasi-judicial authority not being one prescribed by law is challenged on the ground that it is unfair and unjust.

The Constitution of India also provides for adequate opportunity of representation. In case of punitive detention under Article 22 (1) of the Constitution, 'the person arrested must be informed, as soon as may be, of the grounds of such arrest' and he will not be denied the right to consult and to be defended by a legal practitioner of his choice.' In case of preventive detention under Article 22 (5) of the Constitution, 'the authorities must communicate to him the ground on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

Similarly Art. 311 (2) of the Constitution confers two-fold rights to persons employed in Civil capacities, under the Union or a State namely, (a) in case of dismissal, removal or reduction in rank, 'the civil servant must be informed of the charges against him and be given reasonable opportunity of being heard in respect of those charges and (b) where it is proposed after such enquiry to impose on

him any such penalty, until he has been given a reasonable opportunity of making representation on the penalty proposed but only on the basis of the evidence adduced.'

The Supreme Court and the High Courts are also given supervisory jurisdiction over inferior Courts and other quasi-judicial bodies and Tribunals. The Constitution has authorised the Supreme Court and the High Courts to issue writs of Certiorari under Articles 32 and 226 of the Constitution. The High Courts can invoke Article 227 and the Supreme Court may grant 'special leave to appeal' under Article 136, of the Constitution if there is a failure of the principles of natural justice.

The following principles have been judicially recognised :—

- (1) There is no inflexible rules of natural justice of universal application. Every case must be determined separately.

As observed by the Supreme Court in 'Bharat Barrel and Drum Manufacturing Co. Vs. L. K. Bose others' AIR 1967 S.C. Page 361.

"It is now well settled that while considering the question of breach of the principles of natural justice, the Court should not proceed as if there are any inflexible rules of natural justice of universal application. The court therefore, has to consider in each case whether in the light of the facts and circumstances of that case, the nature of the issues involved in the inquiry, the nature of the order passed and the interest affected thereby, a fair and reasonable opportunity of being heard was finished to the person affected."

- (2) Regarding hearing before any Tribunal

other than a Court of Law, 'there is no obligation to adopt the regular forms of judicial procedure.' It is sufficient that the case has been heard in a judicial spirit and in accordance with the principles of substantial justice [Local Government Board Vs. Arlidge (1915) A.C. 120 (HL)].

- (3) What is fair opportunity will depend upon the facts and circumstances of each case.
- (4) "When a statute confers a discretion on an executive authority or a Minister to exercise or not to exercise a power and does not expressly limit the extent of his discretion and does not require him to give reasons therefor, his discretion must nevertheless be limited to the extent that it must not be used so as to frustrate the object of the statute, which confers the discretion." (House of Lords in 'Podfield and others Vs. Minister of Agriculture, Fisheries and Food and others'—(1968) 1 A.E.R. 694.

"What particular rules of natural justice should apply to a given case must depend to a great extent on (a) the facts and circumstances of that case, (b) the frame work of the law under which the enquiry is held and (c) the construction of the tribunal or body of persons appointed for that purpose.

"Whenever a complaint is made that some principle of natural justice had been con

traversed, the Court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case." 'Kraipak Vs. Union of India' AIR 1970 S.C. 150 (156).

The tendency of the recent judicial pronouncements in India and abroad is to extend the principle of natural justice from judicial and quasi-judicial bodies to administrative bodies and domestic tribunals.

As observed by the Supreme Court in 'Kraipik Vs. Union of India,' AIR 1970 S.C. 150.

"If the purpose of the rules of natural justice is to prevent miscarriage of justice, one fails to see why those rules should be made inapplicable to administrative enquiries. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries.

Similarly D. Basu J. held in 'Rama Kanta Vs. District School Board.' (AIR 1969 Cal. 397) as follows:—

"The duty to act judicially is implecit in the exercise of the power to dismiss an employee on charges of misconduct even though the statute which confers such power is silent about the procedure to be adopted"

In a recent case ('The Bihar School Examination Board Vs. Subhas Chandra Sinha and others' 1970 (1) Supreme Court Cases 648) the

Supreme Court of India however held that if an examination was vitiated by adoption of unfair means on a large scale and if the examination as a whole is cancelled, it was not necessary for the Board to give an opportunity to each of the candidates and it would be wrong to insist that the Board must hold a detailed inquiry into the matter and examine each individual case to satisfy which of the candidates has not adopted unfair means.

Hidayatullah C.J. observed "while we do not wish to whittle down the requirements of natural justice and fair play in cases where such requirement may be said to arise, we do not want that the court should be understood as having stated that an enquiry with a right to representation must always precede in every case, however different."

I may conclude this article by quoting the famous observation of P. B. Mukharji J. in K. L. Agarwalla Vs. Collector Land Customs 69 CWN 864 (877).

"Natural justice is fast becoming the most unnatural and artificial justice and for that confusion the courts are no less responsible than the litigant. The judicial climate on this point is thickly clouded with many decisions. The result is that the danger of confusion has become real and natural justice is on the misleading road of sentimental potentialities."

I. L. O—and its role in Developing Countries

By

Ranjit Kumar Goswami, LL.B. (Final year)

The year 1919 is the year of establishment of the International Labour organisation, which had set out both in the preamble to its Constitution, and later in the declaration of Philadelphia adopted in 1944, that the main objectives of the ILO is to secure and consolidate universal peace based upon social justice. Peace cannot be ensured, the preamble declares, unless there is an improvement in the condition of the working class which constitutes the main productive force in any society. The ILO is therefore, pledged to the task of improving conditions of Labour such as regulations of hours of work, prevention of unemployment, provision of an adequate living wage, protection of workers against sickness, diseases, injury arising out of employment, protection of children, young persons and women, protection of the interest of migrant workers, recognition of the principles of freedom of association and organisation of vocational and technical education. The preamble further asserts that the failure of any nation to adopt human conditions for Labour serves as a draw-back on the improvement of the working class conditions in other countries.

Equality stressed :

It has been unequivocally stated in the Decla-

ration of Philadelphia, that Labour is not a commodity, freedom of expression and association are essential to sustain progress, that poverty anywhere constitutes danger to prosperity everywhere and that the war against want requires to be carried on with unrelenting vigour within each nation by continuous and concerted and international effort. At International meetings where representatives of workers and employers enjoy equal status with those of Government, free and frank discussion take place and decisions on democratic lines are taken for promotion of common welfare. The primary aim of ILO is to create conditions in which all human beings irrespective of race, creed or Sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, economic security and equal opportunity.

Uniqueness of ILO :

The very structure of ILO is unique in as much as it is a tripartite organisation in which the Government of different countries, representatives of Labour and employers are equally represented. Decisions in ILO are arrived at, after free discussion between parties, and its recommendations adopted at the conference are

guidelines for the member governments, which are parties to them. During the last 50 years of ILO's existence we find that it is at the instance of the ILO that tremendous strides have been made in improving the conditions of working class in various spheres ; such as regulating hours of work, insurance against injury and ill health, introduction of workers' education and vocational training in various centres etc. The basis for the expansion of ILO's work in the developing countries is thus already established. I.L.O. has come to stay and has grown into a powerful mature institution which can, influence the growth of welfare of working class in the developing countries. It can also play an important role in moulding the attitudes of the working class in their relationship with employers thus promoting democratic traditions. It is this aspect that is gaining importance in the present context of the disturbed conditions, particularly in the developing countries.

Typical Problems :

The major factor of economic tension in the developing countries is the inherent contradiction between limited resources on one hand and unlimited and growing population on the other hand. It is also a fact that in most of these developing countries which have recently gained their political independence, the limited resources and the capital formed out of them, continue to be in the hands of the few who have in due course, developed a vested interest in these limited resources. It is not, therefore, easy to utilise these limited resource's and to deploy them with a view to harness the vast available manpower for maximum productive effort. As a result, a major section of the working class population of developing country remains either unemployed or semiemployed. This major section of population faced with unemployment and starvation becomes restive socially as well as politically. These have their repercussions on the limited economic growth in under-developed

countries. Inspite of tremendous human resources available the growing tendency to introduce more and more capital intensive devices, is another paradoxical feature in these countries. It is because the capital resources are in the hands of a limited few. Most of the other problems arise out of this basic dilemma and it should be the task of ILO to exert itself to make a special study of this problem which is diametrically opposite to the problems of developed countries where the resources have been largely increased and there is a growing need for more manpower.

Decentralised Production :

How best a de-centralised pattern of industrial production can be introduced, would be first and foremost task for the ILO. Most of the developing countries have predominantly agricultural economy and therefore emphasis on employment will have to be essentially agro-industrial. It should not be difficult to give greater emphasis on growth of agricultural production by improving modern techniques such as better seeds, fertilisers, better irrigation facilities and better implements. The cultivators being large in numbers and having small land holdings cannot individually afford to use the improved techniques and they have to be assisted through co-operative effort and with greater credit facilities. The rural areas themselves should have facilities similar to those of urban areas and with improved transport and communication, in times to come, the distance and gap between urban and rural areas will not be felt.

The ILO therefore should cocentrate its attention on the developments of vocational training and use of modern techniques in agricultural sphere, and for the farmer and agricultural Labour which have remained, uptill now, by far, completely neglected.

This should be followed by basic measures

such as ensuring a minimum wage whether in cash or kind for the agricultural Labour throughout the year. And this will take the ILO to the door steps of the smallest man in the remotest village of an under developed country and this ray of hope will make him feel the warmth of the ILO. The ILO has, thus, a tremendous scope for dynamic activity in the developing nations.

Fifty years ago ILO started with an avowed aim of bringing light in to the lives of the workers of all the world. Although this aim has not yet been completely accomplished it can be said that ILO is alive to its short-comings and tasks confronting it. Till to-day it is the

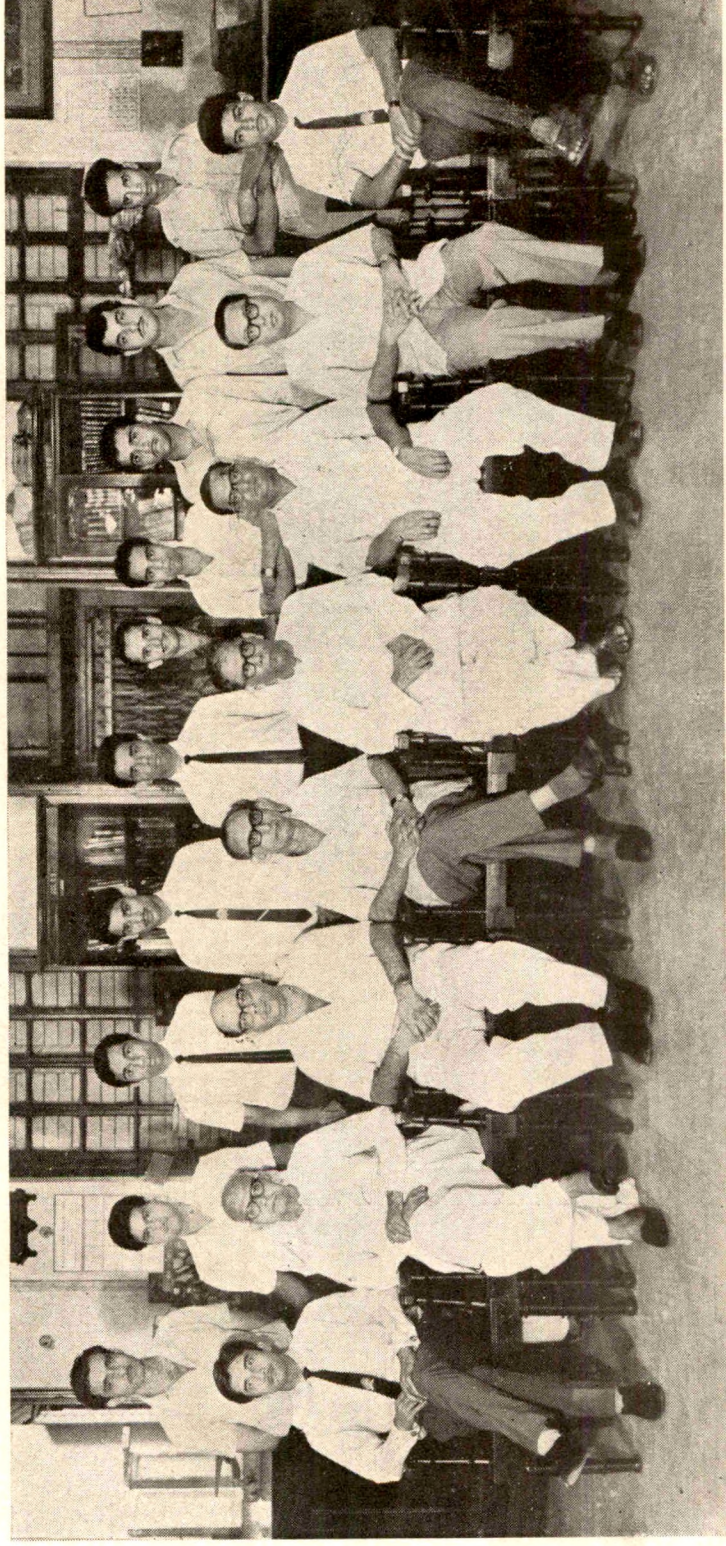
only instrument devoted and dedicated to the improvement and raising of the standards of living of the workers. The technological changes are very rapidly taking place and they are changing the Labour conditions about the entire industrial and social structure. The importance of ILO is, therefore, as much to-day if not more, as it was 50 years ago.

The ILO has now to take up the programme as an important consultant to the developing countries. It is a matter of satisfaction that in the 50th anniversary session of the ILO held at Geneva in June last (1969), recommendations were made for making employment oriented economy plans in developing countries.

University College of Law, Calcutta

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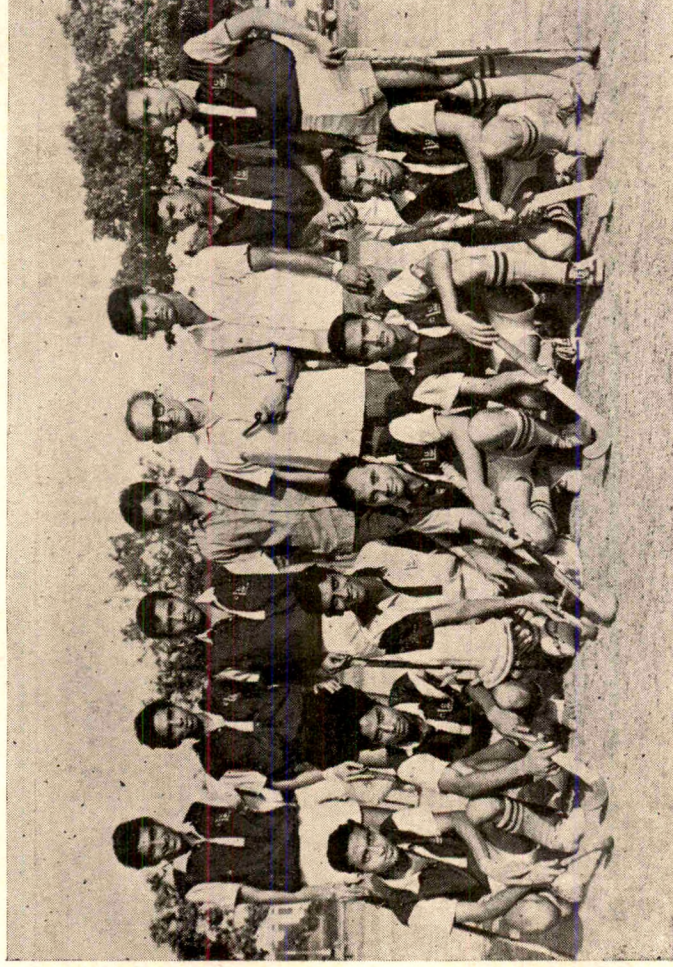
EXECUTIVE COMMITTEE—1969-70



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Standing (Left to Right) :—D. Roy (Volly ball Capt.), D. Hazra, R. N. Pahari (Asst. Secy.), S. Chakraborty (Badminton Capt.), R.N. Chatterjee, S. Chackrabarty (Football Capt.), S. Biswas (Indoor Capt.), D. Hazra (Hockey Capt.), A. Nayak, Hari (Bearer).

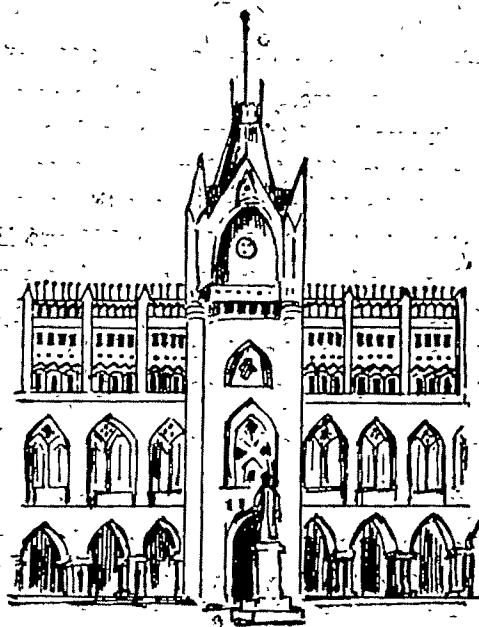
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Sitting (Left to Right) M. Roy Choudhury, A. Palit, D. Sen, S. Neogy,
S. Mondal and S. Hazra

Standing (Left to Right) C. Alvares, D. Alvares, D. Hazra, S. Sarkar (Jt.
Secretary) Dr. B. N. Mukherjee (Principal)
S. Banerjee (Jt. Secretary) S. Sarkar B. Roy Choudhury.

LAW REPORTS



LAW REPORTS

Ram Murthi-Vs-State of Haryana.

Decided on April 14, 1970 by the Supreme Court of India.

Evidence Act (1872), Section 35—Proof of age—Unproved and unexhibited School Certificate cannot be treated as evidence in the case.

Indian Penal Code (1860), Sections 366 and 376—Age of prosecutrix is important.

The age of prosecutrix in cases under Sections 366 and 376 of the Indian Penal Code is always of importance, particularly where according to the medical evidence, the prosecutrix was found to have been used to sexual intercourse and the rupture of the hymen was old. The Court having acquitted the accused of offence under Section 376, should examine the question of age of the prosecutrix more closely. Indian Penal Code (1860), Section 366 and Evidence Act (1872), Section 133—Prosecutrix found to be used to sexual intercourse—Her statements that she was compelled; threatened or otherwise induced to go with the accused who was alleged to have raped her should be corroborated in material particulars from some independent source for basing conviction of the accused.

The prosecution story, as given by the prosecutrix, broadly stated is as follows:—

Satnam Kaur, the prosecutrix, was a student of 9th Class in Dev Samaj High School, Ambala City. One Sumitra Devi was also her classmate. Appellant Ram Murthi, a medical practitioner used to teach in this school as a part-time Teacher. On March 24, 1965 there was some function in the School following the annual examination. After the function, Sumitra Devi took Satnam Kaur to Ram Murthi's house so that he may disclose to them the marks secured by them in the examination. Both these girls reached the house of Ram Murthi at about 6 or 7 P.M. A car was parked in front of the house with the driver sitting in the car and one Protap Singh standing near it. Ram Murthi took both the girls inside the house and entertained them to tea and disclosed to them the marks secured by them in the examination. The tea tasted somewhat bitter and

• Satnam felt slight headache and she requested Ram Murti to take her to her house. Ram Murti promised to do so. Sumitra went upstairs to talk to the wife of Ram Murti and Satnam was taken by Ram Murti to the waiting car. Pratap Singh and one Suresh Kumar also got into the car and Satnam was taken to the house of Suresh where all of them had sexual intercourse with her against her will and without her consent. The driver of the car threatened her that she would be killed if she refused to go inside the house of Suresh or raise alarm. In the same car they took her to Ambala Cantonment at midnight and in the shop of a tailor there, they again raped her under threat of life. In the morning at about 4 or 5 A.M. they took her to the house of one Prem Mittal in Prem Nagar and left her there locking the front door of the house and they left. In the evening Ram Murti returned. At night Prem Mittal raped her against her will and inspite of her resistance. On the following day, Pratap and Suresh again raped her in that house. She was also given some bitter liquid to drink twice against her will. On the night of 27th March, Pratap and Suresh took her to Chandigarh in a bus and kept her at the railway station waiting room. She was threatened with life if she would raise alarm. In the morning she was brought back to Prem Mittal's house at Ambala where Pratap, Suresh and Prem Mittal had again sexual intercourse with her. She was kept in that house till March 29, 1965. During these two days, Pratap, Suresh and Prem used to commit rape on her. On the evening of March 29, 1965 Suresh and Pratap took her to Chandigarh and kept her waiting at the railway station waiting room. The following morning when they were going from the railway station towards the town, near the crossing of the roads she saw some police officers and raised alarm. Suresh and Pratap left her there and she narrated her story to the police officers. She was taken to the police station at Chandigarh and her statement was recorded. The police brought her back to Ambala City where Hariram, Assistant Sub-Inspector of Police threatened her not to involve Sumitra and Ram Murti in this affairs otherwise he would get all the members of her family arrested. Satnam was taken before the Chief Judicial Magistrate, Ambala where she made her statement which according to her, was in accordance with the directions of A.S.I. Hari Ram. After reaching her parent's house she was taken by her father to Ambala Cantonment Police Station and her statement was recorded by the Judicial Magistrate, Ambala City.

Appellant Ram Murti was unrepresented in the Supreme Court by Counsel and the Court requested the Counsel for the State to take their Lordships Mr. Justice J. M. Shelat and Mr. Justice I. D. Dua through the evidence.

The first point which required consideration of the Supreme Court was that of the age of the prosecutrix. In the trial Court she gave her age as 17 years.

In her statement before the Chief Judicial Magistrate made on March 31, 1965 she gave her age as 15 years. In her statement made before Shri Hiralal Mehra on May 21, 1965 under Section 164, Criminal Procedure Code she stated her age to be 15½ years. In the opinion of the learned Judges of the Supreme Court, it was not at all safe to rely on her own statement about her age.

Exhibit PA is the Certificate given by Dr. Ajmer Kaur, Senior Medical Officer at Chandigarh (P.W.I.) who had examined Satnam on March 30, 1965. According to this Certificate Satnam Kaur appeared to be 16 or 17 years old but the police was advised to get her bones X-rayed for a correct estimate of age but that was not done by the Prosecuting agency. This certificate further shows that Satnam was used to sexual intercourse and her hymen was torn, the rupture according to the doctor to be old. In the committing court, Dr. Ajmer Kaur was unable, when questioned, to say whether the rupture of Satnam's hymen was three years' old or more. At the top of Exhibit PA, Satnam's age was described as 15 years at the instance of Satnam. Exhibit PL is a copy of the entry from the Register of Births maintained by the Municipal Committee, Ambala City. According to this entry, on September 27, 1949 Bhagwanti Dai reported about the birth of a daughter on September 25, 1949 to HansRaj, son of Ramkher Jaggi labourer by profession, resident of house No. 393, Kaith Majri. The name of the child or the name of the mother do not find place in the entry but the mother's age was recorded as 25 years and this report further shows that the parents had 3 children.

Maya Devi, mother of the prosecutrix in the trial court on September 16, 1966 gave her age to be 40 years. According to her evidence on examination, the third child born to her was Satnam who was only 15 years old at the time of the occurrence and Bhagwanti Dai attended her delivery of Satnam. Bhagwanti Dai was not produced as a witness through she was alive as stated by Maya Devi. Hans Raj, father of Satnam as a witness in cross-examination stated that his marriage with Maya Devi took place 27 years back and she is now 40 years old. His son Jagdish Lal was born within one year of marriage and Shanta the eldest daughter was born after 2½ years after the birth of Jagdish and Satnam was born 2½ years after the birth of Shanta. The birth name of Satnam was Rama Rani but her name was entered as Satnam Kaur when she was admitted in the school and Bhagwanti Dai had given the name Satnam of this girl when her birth was reported by her.

The Trial Court held Satnam to be definitely below 18 years of age at the time of the occurrence and felt that Dr. Ajmer Kaur's estimate of her age was trustworthy considering also that the prosecutrix was only a student of 9th class and relying on the birth certificate Ex. PL and report of Dr. Ajmer Kaur, Ex-PA and the omission on the part of the prosecuting agency to get Satnam Kaur's

• bones X-rayed as advised by Dr. Ajmer Kaur was not considered by that Court very material. That Court also took into consideration an unproved and unexhibited school certificate which appeared have been obtained by the Investigating Officer and this certificate is dated April 9, 1965 and purports to certify the date of Satnam Kaur's birth according to the school register to be November 5, 1948. The Trial Court however, stated that according to this certificate the date of Satnam Kaur's birth is August 5, 1948. Their Lordships of the Supreme Court admonished the Trial Court for taking this document into consideration and for holding the date of birth as entered in this document to be August 5, 1948. The Counsel for the State in the Supreme Court declined to place any reliance on this document and in the opinion of the Court has rightly done so.

In the High Court the learned single Judge dealt with the question of age and apart from the medical report of Dr. Ajmer Kaur, the Municipal birth certificate, the evidence of Dr. Ajmer Kaur, Hans Raj and his wife Maya Devi, also relied on the school certificate taking the date of birth of Satnam as 5th August, 1948 and came to the conclusion that Satnam was definitely below 18 years at the time of the occurrence although there is some discrepancy between the school certificate and the birth entry Ex-PL.

The Supreme Court observed that it is clear that in the High Court also it was not appreciated that this unproved and unexhibited school certificate could not be treated as evidence in the case and it was also not noticed that according to this document Satnam Kaur's date of birth was November 5, 1948. The Court held that the question of age of the prosecutrix in cases under Sections 366 and 376, Indian Penal Code is always of importance and it was particularly so, in this case, because according to the medical evidence the prosecutrix was found to have been used to sexual intercourse and the rupture of the hymen was old. As the High Court acquitted the appellant Ram Murti for an offence under Section 376, Indian Penal Code because the prosecutrix appeared to be a consenting party not only to the impugned acts of sexual intercourse in question but even on earlier occasions, in the opinion of the Supreme Court, it was a fit case in which the High Court should have examined the question of her age more closely and on the evidence on record their Lordships were far from satisfied that there was any trustworthy evidence on the record on which the conclusion that Satnam Kaur, prosecutrix, was under 18 years of age in March, 1965 could safely be founded.

The question whether Satnam Kaur was compelled or induced by deceitful means to accompany the appellant, Ram Murti was dealt with by the High Court and that Court held that it was on record that Ram Murti was a Teacher in the school and had even before this occurrence, committed sexual intercourse with

Satnam Kaur a number of times in the school so much so that she became pregnant and Ram Murti arranged her abortion from a Dai and being a medical practitioner, it was not difficult for him to do so. According to the High Court, however, it was clear from the statement of Satnam Kaur that enticement had been offered by Ram Murti through Sumitra to tell the marks and if this enticement had not been offered, very likely Satnam Kaur would not have gone to Ram Murti's house and there is enough evidence on the record to show that it was Ram Murti who enticed her and took her away on the day of the occurrence and raped her and as such the offence under Section 366 thus stood proved against him.

The Supreme Court did not agree with the High Court on this aspect of the case and held that there is no evidence on the record on which the offence under Section 366, Indian Penal Code can be sustained against the appellant Ram Murti. According to their Lordships, the prosecutrix had made several divergent statements and keeping in view the medical evidence which shows that the prosecutrix had been used to sexual intercourse, in order to accept her statement that she was compelled, threatened, or otherwise induced to go with the appellant Ram Murti, there should be corroboration of some material particular from some independent source and her bare statement cannot be considered sufficient to sustain the appellant's conviction. According to the Courts below, appellant Ram Murti had exploited his position both as a medical practitioner and as a teacher and he has been having for some time past illicit intimacy with Satnam Kaur but the charge in the present case does not consist of what had happened before March 24, 1965 and the charge only consists of what is stated to have happened between March 24, 1965 and March 30, 1965 when Satnam is not proved to be under 18 years of age and during this brief period, their Lordships of the Supreme Court did not find any evidence of inducement, threat or compulsion on the part of the appellant Ram Murti towards the prosecutrix. Accordingly, the Supreme Court came to the conclusion that there was thus no evidence on the record to sustain a conviction under section 366, I.P.C. against the appellant Ram Murti and the appellant was acquitted.

* * * * *

[The case is instructive to the students of tender age and a serious reflection on the conduct of the teachers. Acquittal due to absence of legal proof either due to lapses on the part of the prosecuting agency or the past instances of departure from the paths of virtue by erring girl students is one thing but the norms and standards of behaviour of the teachers towards the girl students are absolutely different matters beyond the purview of law. —Editor-in-Chief]

"It is very easy to show one's 'revolutionary' temper merely by hurling abuse at Parliamentary opportunism, or merely by repudiating participation in Parliaments; its very ease, however, cannot turn this into solution of a difficult, a very difficult problem.

—V. I. Lenin.

"Law is the organ of folk-right: it moves and grows like every other expression of the life of the people; it is formed by custom and popular feeling, through the operation of silent force, and not by the arbitrary will of a legislator."

—Savigny.

UNIVERSITY COLLEGE OF LAW UNION, CALCUTTA

1969-70

OUR CORNER



REPORT FROM THE GENERAL SECRETARY

It is incumbent upon the General Secretary to submit his report on the activities of the union in order to fulfil the needs of our annual Law Journal which is apt, no doubt, to give some amount of topical, legal and professional value to its readers.

It is a long standing practice and no deviation from it is desired by anyone, I, therefore, narrate briefly the adventure and activities which, I trust, will not be misjudged or misconstrued.

In carrying out arduous tasks, our organisation has largely based its actions on such procedure as led to the establishment of protection of our students' right in some fundamental objects. Our action in the first place related to the admission of students in our Law College and adoption of standards in this matter giving more facility to graduates of our University. We also fought our best to revise the course in the collective interest of the students of law, effecting some changes in the new curricula enforced by the Bar Council of India from the session 1969-70.

We fought hard for the appointment of a permanent Principal and two Vice-Principals and also two Office Superintendents, one each for the Hajra, Road unit of the Law College. But the administrators of our University have proved themselves inactive in deciding the matter for the last four years. It is a pity that our Law College which is the biggest Law College with the biggest Law Library in the continent of Asia, founded by Late Sir Asutosh Mookherjee, is being neglected due to mal-administration of the University with unjust and meagre allocation of finance although the students of our Law College contribute most to the University Fund. Law Library is no longer up-to-date and students get little assistance from the Library, thanks to the tight budgetary provision introduced by the Pro-Vice-Chancellor for Finance. Ill-lighted class rooms with electric fans mostly out of order and leaky roofs greet the students daily and we do not know what for money is being spent upon the Estate Officer and the Engineering Department. Absence of students' common Room is another distinct feature of this Law College. A College with nearly six thousand students is without a permanent Principal and without Vice-Principals.

- Absence of regular cash counter at the Hazra Building of the College is another achievement of the University.

The Law Examinations which were conducted far beyond the scheduled time were almost regulated by our ardent efforts but unfortunately the management of the University became calous and failed to restore its usual programme due to lack of supervision or firmness in demanding the mark sheets in due time from some examiners who have influence in the management of the University. The appointment of invigilators in the examination centres is not above board and many of them gave very poor account of themselves.

Our Union had to pass through the days with heavy odds and several disturbances mischievously created by them who had failed to gain control of the Union. But still our organisation did not lose its strength, rather with full co-operation from all corners, we spared no pains to implement smoothly our constructive programmes.

Some parts of our State were inundated with flood and the havoc of the distressed people of the areas could not be overlooked by us. We proposed to do some relief work in Malda but unfortunately we had to drop the idea most reluctantly due to some unfavourable circumstances over which we had no control and so our cherished desire could not be fulfilled. The funds also could not be collected to our satisfaction and so at last we handed over to the Governor Shri S. S. Dhavan, a sum of Rs. 1010/- for the relief purposes.

A portion of the Hardinge Hostel attached to our College is damaged and dilapidated and we moved the authorities of the University who at last woke up from their slumber. Similarly, they arranged to repair the roof of the third floor verandah of the Darbhanga building and we were successful in our attempts.

As regards the Hardinge Hostel, one thing pains us. The Hardinge Hostel which was after the name of a British Governor of Bengal, should justifiably be renamed after Sir Asutosh Mukherjee or Dr. Shyamaprosad Mukherjee since we are now living in India freed from the shackles of British Imperialism.

We gave a hearty reception to Dr. W. Friedman, Tagore Law Lecturer of this University. Our revered Offg. Principal Dr. B. N. Mukherjee presided over the function which was graced by many distinguished advocates also.

We held a symposium on "The Continuation of the Original Side of the High Court at Calcutta, on 8th September 1969."

We organised a Study Circle with a group of competent teachers for guidance to the Law examinees who were much benefitted for their making progress at their respective Law examinations.

We held the Inter-Class debate and Moot Court competitions among the students of our college. It is a matter of great pleasure to announce that our fellow students recorded brilliant results, in the Inter-Collegiate Drama, Debate, Recitation, Music, Elocution, Brain Trust and other competitions organised by the Calcutta University Institute.

We held the annual All-India Inter-University Asutosh Memorial Debate and accorded welcome to the freshers in a social gathering. We also organised the Saraswati Puja in the University Lawn.

It is needless to give here the details of our activities which will be found in the reports of the Secretaries of various departments of this union.

In this connection we like to mention that still we are in a position to offer more seats to the students willing to join LL.B. classes if the college authorities provide the necessary amenities to absorb the additional need.

We could also experience that the present constitution of our Union genuinely requires some amendments but due to unforeseen circumstances we could not proceed with the matter. We leave the matter to our successors whom we request to revise the Constitution according to the needs of our fellow students.

The University authorities have invented a new scheme. They sell the forms for admission to our Law College and the sale proceeds go to the University Fund. It should be considered whether the collection on this account should be spent for the aid of the needy students of this College through the Students' Aid Fund.

We experienced hardship in the management of the Union fund in the days of economic crises. In my opinion the department of Magazine, Debate, and Students' Aid Fund should be given more preference and the University authorities should grant special subsidies for the above three particular departments over and above the amount sanctioned in the Budget of the Union Fund each year. We have moved the University to sanction a subsidy for the Students' Aid Fund in order to grant some facilities to the needy and deserving students of our College. The matter is still pending with the University and our successors are requested to pursue the matter vigorously. Due to paucity of our funds we could not send our teams to participate in the debating competitions in various Universities and we are diffident to express our inability in this respect. We are afraid, unless our successors are vigilant enough in exacting subsidies from the University they will also have to face the same disadvantage to manage the Union work smoothly and satisfactorily.

We had a view to lead a party of our fellow students for excursion to visit some important places in the northern parts of India, but we had to cancel the programme at the last moment on account of political and other disturbances prevailing everywhere at that time.

Our Annual Social was held on 20th July, 1970, at the Mahajati Sadan. This is the last function of the Union for the session and the function was a grand success.

One important matter, however, could not be pursued by the Union and that is improvement in the service conditions of our teachers who are also our honorary members. The present pay scale for our teachers require immediate

- revision so that they may discharge their onerous duties without being haunted by perpetual penury and the tuition fees realised from the law students are enough to give them a decent scale of pay. I leave it to my successor to take up this matter right from the beginning of the next session.

It is a fact that my report cannot be exhaustive and so I have given the details in brief. The readers will, I hope appreciate our objects and views and suggestions made therein will, no doubt, receive serious considerations.

We offer our thanks to all for the co-operation and help rendered to the Union.

We offer our grateful thanks from the very core of our heart to Dr. B. N. Mukerjee, our Principal (Offg.) whose erudition, wisdom, sympathy, kindness and manners and specially a large measure of co-ordination in all spheres of the college and of the students and of the Union should be treasured by each and every student of our Law College. Even though he had to work within the limited bounds, yet he committed himself as one of the best friends of the students. The shabby treatment meted out to him by the University authorities will not go unchallenged and students of the Law College will spare no pains to get him back as the permanent Principal of this college.

We also offer our gratitude to our President-Prof. J. K. Mukherjee, Vice-Presidents, Prof. A. K. Mitra (Treasurer), Prof. J. N. Haldar and Prof. K. P. Basu whose constant assistance and guidance as executives of our Union led us to the path of success. Our thanks are also due to other members of the teaching staff of the college who favoured us with instructions whenever asked for. We offer our best thanks to our fellow students without whose co-operation and support no function of this Union could have achieved success. Our sincerest thanks are to the members of the office staff of the College and particularly to Shri M. P. Basu, Superintendent of the College, for their ungrudging help rendered to the students during the session.

I offer my sincerest apologies if any error or omission has crept in through oversight and inadvertence.

Long Live Students Unity !
Long Live Students' Union !

Manik Bhattacharya.
General Secretary.

REPORT FROM THE ASSISTANT GENERAL SECRETARIES

Before we part and say 'Good bye' we do not know whether we could but we feel we should impart a piece of advice—more caution than advice.

Throughout the year the Union had difficulties in meeting all the obligations for the perennial shortage of funds. With the prices of every commodity and service soaring sky-high it is becoming impossible to cut any sort of a cost.

The University has merged the Law College Funds with its own fund much to its benefit and it will not be out of place to say that the Law College is a profiteering concern of the University. But much to our dismay and inspite of our protests, the University keeps the profit and uses it to subsidize its other departments.

We have tried and the authorities have given us an assurance that they will make an effort to grant a sum to the Union to meet its many demanding obligations. With pressure, the next Union may hold the authorities at their word and get a grant sanctioned over and above our collection from the students.

With a strong Union as ours which consists of over 6,000 students there is no reason why securing such a grant can not be done.

ABANI KUMAR RAY

AVIJIT DEB

ASSISTANT GENERAL SECRETARIES (Office and Accounts)

"The art of politics (and the Communist's correct understanding of his tasks) consists in correctly gauging the conditions and the moment when the vanguard of the proletariat can successfully assume power, when it is able—during and after the seizure of power—to win adequate support from sufficiently broad strata of the working class and of the non-proletarian working masses, and when it is able thereafter to maintain, consolidate and extend its rule by educating, training and attracting ever broader masses of the working people."

—V. I. Lenin.

"The proletariat seizes the public power, and by means of this transforms the socialized means of production, slipping from the hands of the bourgeoisie, into public property. The development of production makes the existence of different classes of society thenceforth an anachronism. In proportion as anarchy in social production vanishes, the political authority of the state dies out. Man, at last the master of his own form of social organization, becomes at the same time the lord over nature, his own master-free."

—F. Engels.

REPORT FROM THE AID FUND SECRETARIES

It is very heartening to report that the AID FUND has passed another year of dedicated service to the students. The passing year had devolved upon the fund a tremendous task to stand the test of time of winning sanctions and privileges from the University Authorities and to enable its fellow students to better enjoy these privileges.

The absence of library in the Hazra College Unit and the inconvenience caused to the students were deeply felt by us and therefore, we made it our first task to make the management concede our demand with the result that the library has now been opened in the Hazra Law College Unit with a large number of books being purchased for the purpose.

We felt the grievances of our fellow students at Hazra College Unit for the lack of cash counter at that unit. Consequently, the Management had nothing but to accede to the pressure of our demand for which a Cash Counter is presently being operated there once in a week. We have noted it carefully to further press our demand so that the cash counter may operate every day within a near future.

We took steps simultaneously to distribute the copies of new Regulation syllabi to the new entrants to the college. It was observed by us that the new syllabi would be too lengthy for the students to complete the full course within the specified period. It was a bold step for to rise to the occasion to make the authority convinced for the reduction and modification in the volume of new syllabi. We have pleasure that we succeeded in our purpose in this direction.

The Aid Fund has been under constant vigilance to safeguard the rights and privileges of the students and has been stream lining all out efforts to the welfare cause of the students in general. We feel proud that we were able, out of our meagre resources to disburse a sum over of Rs. 7,000 as financial help to the deserving candidates. We have already received quite a substantial number of applications which are under scrutiny.

The fund may quite legitimately claim of its success in conducting study circles both in the morning and in the evening for the purpose of Preliminary and Intermediate Examinees. The need of such study circle was deeply felt by us and was very much enthusiastically responded to by the brilliant students and ex-students of the college who have been taking pains all through out to guide the students effectively.

Like previous year we could add to the number of books in the library being donated by our fellow students during the period under review for which we express our deep sense of gratitude to them.

The distinguished services of the Aid Fund have been marked by its efforts in printing and distributing question papers, book-lets etc. which have been proved very useful to the students for appearing in the Law Examination.

The stringent problem which the Aid Fund has been confronted with and which has been pressing hard to it is the meagre amount of the financial resources at its disposal. It is beyond any body's doubt that the welfare body such as the Aid Fund cannot thrive well and attain its purposes if it is put to direct its activities always being pulled down by the insufficiency of capital fund. Although we could make ourselves very useful by our financial aid to a good number of deserving students, still we could not but lament that we had not been able to come to the rescue of many of our fellow students who were equally deserving for the purpose.

Before we concluded we express our heart-felt gratitudes to Dr. B. N. Mukherjee, Principal (Offg.), professors and ex-students for their invaluable counsels to the every aspects of the fund and we also express our heartiest thanks to the members of the library staff of the Aid Fund for their sincerest and painstaking services.

K. R. Yagnik.

Bijoy Ghosh.

Joint Secretaries.

Department of Students' Aid Fund.

THE REPORT FROM DEBATE SECRETARIES

After assuming our office we did first know whether we are to tend and what entwines itself more closely about the department after the change of incumbents. The picture was made, not to conceal, but to adorn and attain splendid success in our efforts with confident promise and avowed object.

Under the operation of the policy that was initiated, no failure could creep into, but instead, success was formulated in a clear form that gave audible response to all. We were not at all diverted by any sophistical contrivance but we could stand by our duty effectively and did not allow any circumstance to overrun us in our responsibilities. Even though the year concerned was full of political disturbances, yet our work was not impeded and for that our congratulations should go to the students of our College.

The first and foremost duty that fell on us was to send teams for competitions at the Annual Inter-Collegiate Competitions organised by the University Institute, Calcutta. Our colleagues did best and attained brilliant results. Sri S. Ramani won the first prize and Sri Avijit Deb won the second prize in the Inter-Collegiate English Debate. Sri Achintya Bose won the second prizes in the Bengali Debate, Bengali Eloquence, Bengali Brain Trust and Bengali Recitation competitions. We are fortunate that we have in our midst Prof. S. K. Dasgupta and Sri Sujay Srimal who were the guide and light in most of the competitions.

Our fellow-students participated in many other debate competitions organised by the Scottish Church College, Calcutta Medical College, Bantra Public Library, The Vikas, Durgapur State Bank Employees and some of our students did well and were greeted with high commendations.

We organised the All India Inter-University Asutosh Memorial Debate competition on the 4th April, 1970 which was graced by the august presence of The Hon'ble Mr. Justice Sisir Kumar Mukherjea of Calcutta High Court, who inaugurated the debate. We are bold enough to announce that the idea of holding an All India Inter-University Debate first sprang forth in our college and the Asutosh Memorial Shield was the Trophy, the first and the best of its kind in India and the competitors hailed from all Universities in such a great number that the competition had to be held for two consecutive days to finalise the results. This All India Debate of our college initiated other universities to organise such competition following our steps.

In the Asutosh Memorial Debate of this year only twelve institutions could send their representatives whereas some other twelve institutions from different parts of India regretted their inability to participate on account of the unfounded apprehension of unsettled political atmosphere in Calcutta. In this competition the Asutosh Trophy was won by the Calcutta Medical College represented by

Sri Sivaji Basu and Sri Biswajit Sen who stood first and third respectively in order of merit. Sri Udayan Mukherjee of the University College of Law, Calcutta, won the second prize and Srimati Rukmini Kaul of Lady Brabourne College won the prize for the best lady speaker.

The motion of the debate was—"THIS HOUSE IS ALARMED AND DESPONDENT AT THE PROSPECT OF 1972." The debate was graced by many distinguished jurists on invitation and it was described as a remarkable feature of our College Union.

Next we hold the Inter-Class debate at the Hajra Road Branch of this Law College on the 25th April, 1970. The motion for the debate was—"PROGRESS DEPENDS UPON UNREASONABLE AND VIOLENT MEN." Sri Prithwis Sarkar (2nd-yr. LL.B.) won the first prize and Sri Lab Chaudhuri (2nd-yr. LL. B.) and Sri Sreekumar Das (1st-yr. LL.B.) won the second and third prizes respectively.

We received invitations from many institutions from distant parts of India but on account of scarcity of our funds we could not participate. We leave the matter to our successors who may like to move the University authorities to grant our Union a subsidy for our participation in the debate competitions organised by other Universities. Before we conclude, we offer our grateful thanks to Dr. B. N. Mukherjee, Principal (Offg.), Prof. S. K. Dasgupta and Prof. M. G. Mukherjee and other members of the teaching staff of our college for their valuable instructions and encouragement in our achieving success in all spheres. Our thanks also go to the President and the Vice-Presidents and the Executives and other members of the Central Council without whose support and co-operation success in our efforts would have been impossible.

Our Special thanks are due to Sri Manik Bhattacharya, General Secretary, whose guidance and constant help enthused us in our work. We also offer our thanks to Sri Pranit Ghose and Sri Dibyendu Mallik whose untiring energies and constant guidance led us to the path of our glorious success. Our thanks are due to the office staff for their unstinted co-operation with us. Lastly we offer our thanks to our fellow students but for whose co-operation we could not have achieved anything.

Pankaj Kumar Samanta.

Biraj Mohan Dutta.

Joint Secretaries,

Department of Debates.

REPORT FROM THE SECRETARIES FOR CULTURAL AND LEGAL CONFERENCE

On the 8th day of September, 1969, we organised a Symposium on a subject which was very controversial and very much topical. The subject was on 'THE CONTINUATION OF THE ORIGINAL SIDE AT CALCUTTA HIGH COURT'. Its importance can be judged by the fact that the subject was debated on the floor of the Assembly a day after the symposium.

The then Advocate-General Sri S. K. Acharyya presided over the function with charm and grace characteristically his own. The then Hon'ble Judicial Minister Sri B. B. Mandal was the chief guest and expressed his opinion on the subject for the scheme was his brain-child.

Legal luminaries spoke on the occasion expressing their views. Amongst them were Sri Sankardas Banerjee, Sri Gouri Mitter, Sri Amar Chakraborty and Sri Salil Ganguly, M.P., Sri S. C. Sen and Sri Arun Dutta.

The Symposium met with tremendous success and this being the first function of the Union was the forerunner of many more successful functions which followed in the course of the year.

We thank all the students for their kind encouragement, active participation and for their inspiration exhibited and the never-ending faith which they had on us. Failures if there have been any lies at our door and we extend our apology for it. Hoping the next Secretary of Cultural and Legal affairs will come across more success and we wish him all the best for the year ahead.

**AVIJIT DEB
GOPALJI KHETTRY**

Secretaries, Cultural and Legal Conference.

"Not a single victory of political freedom over the feudal class was won except against desperate resistance. Not a single Capitalist Country evolved on a more or less free and democratic basis except by a life-and-death struggle between the various classes of capitalist society."

—V. I. Lenin.

CALL OF MAIDAN

So, we are back again in the columns of the Law Journal with the pack of glories for the third consecutive year. Dear friends, it may seem unbelievable, particularly in these days of uncertainties, that we could retain the "Statesman Cup" awarded every year to the best college team by the Calcutta University Sports Board taking into account its performances in all Inter college games. Moreover, the reigning champions generally do suffer psychologically. But our Athletic club positively worked wonders in overcoming them. As stewards, we now venture to intimate you through these columns how it all happened despite the fact that the green-carpet strollers are not supposed to put things down so lucidly as any other, but for our bounden duty.

Our Athletic Club should have started its season with Foof-ball. But an unprecedented circumstance arose before us by reason of an ad-interim order of injunction obtained by one of our ill-advised friends. Since we were restrained, we could not participate in the Foot-ball tournament inspite of having a formidable side. We wish, such curses may not fall unto our Atheletic club again.

We made our first appearance in the Calcutta University sports Meet. Our Atheletic team fought tooth and nail with reigning champion Vidyasagar Evening College and finished a close Runners-up-only 5 pts. behind. We are proud of Tapan Dasgupta who rendered a good account of his Athletic talents, had the additional honour of leading the Calcutta University Athletic team to Baroda. Mention should also be made of Mrityunjay Chatterjee who was adjudged Joint Individual champion of the Meet.

The colourful evening of our college Sports Meet will always be remembered. As usual, the Calcutta Police Band gave a varied display of enchanting music amidst a huge gathering of fellow friends professors and of course, our torch-bearer the Hon'ble Judges of the High Court whose gracious presence encouraged the participants and gladdened us all. We are indebted to the Hon'ble Mr. Justice A. C. Gupta for sharing the pleasure of the day as the chief guest and kindly distributing the prizes. We are grateful to our beloved Principal (Offg.) Dr. B. N. Mukherjee, for presiding over the meet. We are further glad to have in our midst Professor Mr. Justice Henry Buch from Belgium who gave an enlightened speech on the occasion. We also note our sincere gratitude to Mr. P. K. Sen, Commissioner of Police, for his kind presence and reminding our fellow-friends with his reminiscences of the past activities of our college.

We participated in Inter-collegiate Swimming but unfortunately could not achieve much success.

Our Cricket team on the contrary, played upto its reputation from the very first match under the able captaincy of Debabrata Mukherjee. We offer our heartiest congratulations to Deb for his persents in the last mach which incidentally was also last for our athletic club. For, Deb scored a chanceless century and accounted for a double century partnership with Gopal Bose. Bose acored 117 Not out and earlier captured 6 wkt. for 49 to be adjudged as the best player of the tournament to win the "Chancellor's Medal". Our congratulations to Subrata Guha, Dilip Dosi, S. Podder and D. Hazra who also contributed im-

mensely to the team in our thumping victory in the S. Roy Memorial Shield.

In the Basket ball tournament, our team though consisted of experienced and reputed players paid the price of costly mistakes when it had to concede the semi-Final match to a less-fancied college team.

In the Inter-collegiate Hockey tournament we made a "Landmark" in its history. For we won a "Double". It was a convincing result of our hockey prowess. We are glad to say that five of our players were selected to represent the Calcutta University for the Beighton Cup engagements this year. We are further proud that during the eleven matches played this year no team could score a goal against us.

We regret to inform that the University authorities failed to organise Indoor-games competitions, such as Badminton, lawn-Tennis and Table-Tennis. Of course, it is well known to you that we are holder of the Badminton title for the last two years. This year also, we had the same team. The C.U. however, participated in the Inter-varsity tournament where our Subrata Chatterjee led the team. Our Badal Bhattacharji also played well as a team member. The Inter collegiate Rifle-shooting competition also met with the same fate. As promised by the authorities we organised a good side, but as ill-luck would have it, the Inter-collegiate shooting did not come off. Our consolation, however, came from Indrajit Guha—our fellow-friend who was chosen to lead the C.U. Team in the Inter-varsity. Our thanks to Indrajit who gave a splendid performance there.

The air of the University Sports is, perhaps, looming large in our arena too. In spite of our earnest endeavour we could not finish the Badminton tournament having reached the final stage. We hope to arrange the final on the reopening of the college after summer recess.

Our oarsmen in the Rabindra Sarobar Lake were a shade better than the previous years. They steered our boat steady all along to win the League Regatta. But due to sheer misfortune we could not get the Knock-Out Trophy for a last stroke. It was indeed a memorable piece of boat-racing on the Knock-Out Final when we lost in a photo finish. Our congratulations to A. S. Dutta Roy, M. Sen, R. Basu Ray, A. K. Kannungo and D. Bose who had done extremely well.

Our Gymnasium under the valuable instructions of Mr. Universe, Manotosh Roy is being run at a fairly quicker pace than before. We are happy to see the increase in the daily attendance of fellow-students. It is evident from the fact that the number of members enrolled this year are almost double than the previous year. During the 'Mr. Law College' 'Mr. Samson' and 'Mr. Asana' competitions, much credit goes to the members without whose co-operation, the memorable evening could not have been made to realise at all. Our thanks to Mr. Manotosh Roy, Mr. Universe, Physical Instructor of our Gymnasium who conducted a magnificent show of muscles and acrobatics. We also express our respectful gratitude to the honourable judges who spared no pain to spend their valuable time to bring our competition to its ultimate success. We congratulate Manas Sadhu, S. Patra and N. Ray who won the 'Mr. Law College', 'Mr. Samson' and 'Mr. Asana' title respectively.

We would be failing in our duties if we do not express our respectful gratitude to our beloved Principal (Offg.) Dr. B. N. Mukherjee, Prof. M. N. Roy, President of the athletic club whose affectionate guidance and ungrudging co-operation had indeed been a great source of encouragement. Last but not least we note our indebtedness to Sri Debangsu Mitra for his untiring help in our day to day activities. We also extend our sincere thanks to the members of the Athletic club and fellow students in general, without whose co-operation it would not have been possible for us to conduct our activities in such a successful manner.

Before we conclude we would like to urge our student friends to maintain the enviable standard of our Athletic club. Looking forward to a brighter future.

Suhrid Banerjee,

Sudipta Sarkar.

Joint Secretaries,

University College of Law Athletic club.

"A political leader who desires to be useful to the revolutionary proletariat must be able to distinguish concrete cases of compromises that are in excusable and are an expression of opportunism and treachery; he must direct all the force of criticism, the full intensity of merciless exposure and relentless war, against these concrete compromises."

—V. I. Lenin.

"In many countries, including the most advanced, the berusgeoisie are undoubtedly sending agent provocateurs into the Communist Parties and will continue to do so. A skilful combining of illegal and legal work is one of the ways to combat this danger."

—V. I. Lenin.

FROM HARDINGE HOSTEL

A Students' Hostel, in our common sense, is the common platform of unity among students hailing from different parts of the country with dissimilar language and culture and it is therefore an 'UNITY IN DIVERSITY'. The boarders living here for three years in pursuit of law study get a fair chance to live a life of harmony with the new acquaintances.

Our boarders leave behind series of glorious achievements during the year. The department of the Athletic Club including the Gynasium located in the Hardinge Hostel exhibited splendid success in several events. To tell the truth, they have stirred eventually a new sensation among the boarders of our Hostel with a legacy to follow in the enterprising sports and games.

In the field of education, examinations now a days seem to evoke horror every time. But it is an exception to the boarders of our Hostel and also to the students of our Law College. Two of our boarders Mr. Kanailal Bhowmik and Mr. Swapan De have qualified themselves in the Chattered Accountancy Final and the Intermediate examinations respectively besides their credit for law studies. Several other boarders including Mr. Alok Mitra picked up applauses in the cultural functions. So our Hostel boarders are not apathetic to education and culture which are the desired qualifications of the students.

It is a remarkable feature of our Hostel that all the time we lived as members of a single family. We utilised the short courtyard of the Hostel for playing Badminton and worship of the Goddess of Learning. The Saraswati Puja festival, we celebrated was a glorious social function entertaining all including the learned professors and the staff of the college. In this connection we received with thanks a contribution from the Union Fund through the General Secretary.

We have described the bright sides of the Hostel but we shall not shirk our responsibility to deal with the dark sides with our genuine grievances which are not insignificant. The scarcity of utensils, dinning tables, well-seated, well-ventilated and well lighted rooms, suitable lavatories, canteens and tea-stalls and sick rooms in each floor and many other requisites remain unsolved and so they leave us to despair. There is a common room in name only but not with the requisites viz.: Table Tennis Board, Carrom Board, etc. There is no telephone in this renowned Hostel and it is a wonder. There is no Radio in the Hostel and it is also a matter of regret. We approached the proper authorities to remove the grievance but to no effect. We therefore leave the matter to our successors who, we are sure, will fight hard to get the legitimate demands fulfilled.

The most wonderful aspect of our Hostel is that there is no resident Superintendent and/or Deputy Superintendent.

One thing stikes us most that we being citizens of Free India have not yet thought fit to change the name of the Hostel named after a Britisher. Would it be too much to expect the University authorities to the change of the name of the Hostel to be named after 'SIR ASUTOSH MUKHERJEE' or his glorious son 'SHYAMAPRASAD'? The Hostel building requires immediate repairs and complete renovation befitting the University Hostel for the Post-Graduate Students and wastage of lakhs of rupees just for minor patch-work plastering outside and white washing of the building cannot but be severely condemned.

We offer our thanks to all who stayed with us in the Hostel and made us familiar to all with little disappointment to them.

Parimal Dhar, **Chairman**—2nd floor.

Sajal Naskar, **Chairman**—3rd floor.

Kalyan Sen, **Chairman**—Top floor.

(HARDINGE HOSTEL)

"The two great Asiatic powers, England and Russia, have by this time got hold fo one point between Siberia and India, where Russian and English interests must come into direct collision. That point is Peking. Thence westward a line will ere long be drawn across the breadth of the Asian continent, on which this collision of rival interests will constantly take place. Thus the time may indeed not be so very distant when "the sepoy and the cossack will meet in the plains of the Oxus," and if that meeting is to take place, the anti-British passions of 150,000 native Indians will be a matter of serious consideration."

—F. Engels.

"All religion however, is nothing but the fantastic reflection in men's minds of those external forces which control their daily life, a reflection in which the terrestrial forces assume the form of supernatural forces."

—F. Engels.

FROM THE DESK OF THE EDITORS

So, at last! we have succeeded to publish this Law Journal in due time. Saving few exceptional cases the Editors shouldering the responsibility of bringing out the Journal in time have always lost their battle with the clock in the past. So this time also we can claim it to be an exceptional. To those who are directly or indirectly responsible for its publication, it is really a great pleasure which can not properly be expressed in any language. Therefore at this auspicious moment we do not want to recall the memory of the troubles and handicaps with which we have to run the race.

We do not know how far we have been able to uphold the enthusiasm amongst the student friends and how far we have succeeded to impress their mind that this Law Journal is for the student, of the student and by the student. But it is really not very encouraging for us to witness the poor response from the students to our appeal for contributing articles for this Law Journal. Nevertheless the volume of student's contribution has increased in this annual number. Let us hope that the students participation will definitely overtake our expectation in the next issue.

It is our proud privilege to believe that the contents of this Law Journal is full of collections on current and important legal issues written by different eminent persons, prominent professors and ardent students. We are sure that the students of law will definitely get great benefit out of it.

We would be failing in our duty if we do not express our greatfulness to the Hon'ble Judges of Calcutta High Court and our respected professors for their valuable contributions for this journal inspite of their various preoccupations. It proves that they love this journal and love the students. We also congratulate our student friends for their active co-operation. We extend our sincere thanks to Sreekanta Press for their hard efforts to print the journal within a very short time and to the management of Soviet Desh for helping us by lending their block. We are also grateful to Sri Sankar Majumdar for the cover out lay of this journal. Lastly, we express our heatiest thanks and gratitude to our Editor-in-Chief Prof. J. N. Halder for his continuous effort and active co-operation this journal could not be broughtout.

With these few words we are forwarding this journal to the hands of our dear friends with a great expectation of their full satisfaction.

DILIP KUMAR SEN
SREEMANTA BORAL
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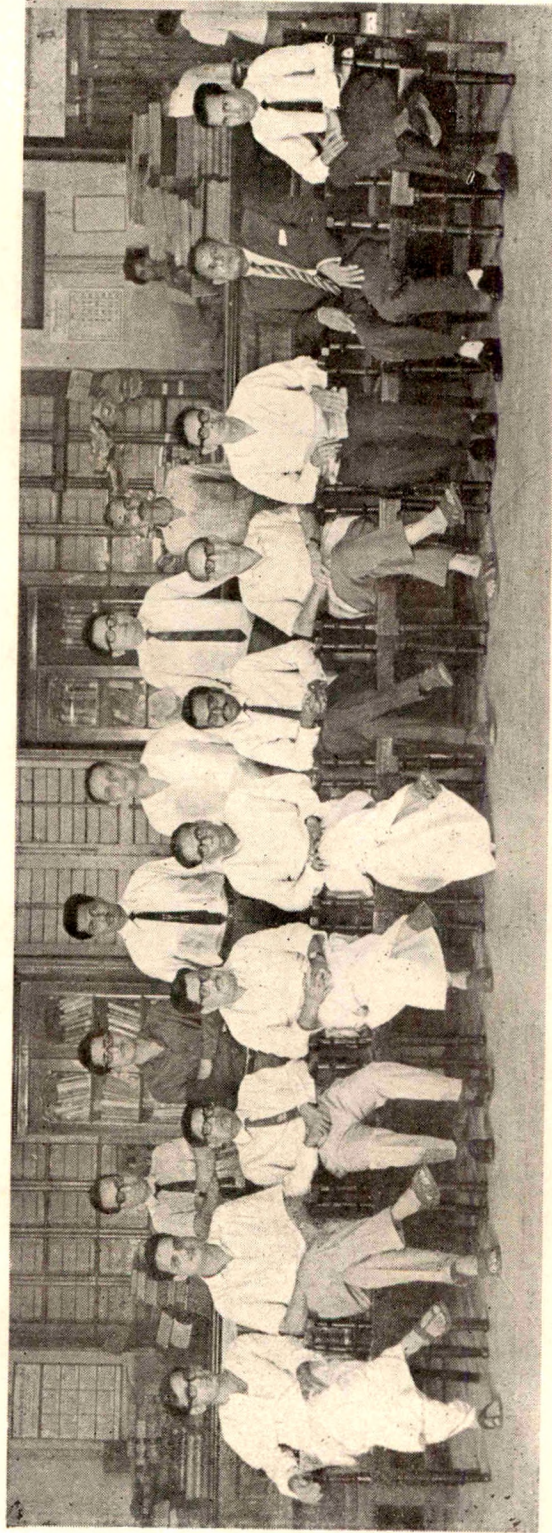
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1969—70



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"Experience has proved that, on certain very important questions of the proletarian revolution, 'all' countries will inevitably have to do what Russia has done."

—V. I. Lenin.

"Leninism is Marxism of the era of imperialism and the proletarian revolution. To be more exact, Leninism is the theory and tactics of the proletarian revolution in general, the theory and tactics of the dictatorship of the proletariat in particular."

—J. Stalin.

"Yet, in a social point of view, Hindustan is not the Italy, but the Ireland of the East. And this strange combination of Italy and Ireland, of a world of voluptuousness and of a world of woes, in anticipated in the traditions of the religion of Hindustan. That religion is at once a religion of sensualist exuberance, and a religion of self-torturing asceticism, a religion of the Lingam, and of the Juggernaut ; the religion of the Monk, and of the Bayadere".

—Karl Marx.

"Criticism—the most keen, ruthless and uncompromising criticism should be directed, not against parliamentarianism or parliamentary activities, but against those leaders who are unable—and still more against those who are unwilling to use parliamentary elections and the parliamentary rostrum in a resolutionary and communist manner."

—V. I. Lenin.